No. 85-1850

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROBERT and MARY YARIS, on their own behalf and as next friends of MICHAEL YARIS; STEPHEN and MARILYN STUBBS, on their own behalf and as next friends of ADAM STUBBS; and MISSOURI DEVELOPMENTAL DISABILITIES PROTECTION AND ADVOCACY SERVICES., and on behalf of all those similarly situated,

Petitioners,

vs.

ARTHUR L. MALLORY, LEONARD W. HALL, DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, and STATE BOARD OF EDUCATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER PLAINTIFFS ARE ENTITLED TO AN WARD OF ATTORNEYS' FEES AND EXPENSES AS REVAILING PARTIES UNDER THE REHABILITATION CT ON A CLAIM THAT COULD NOT HAVE BEEN TIGATED UNDER THE EDUCATION FOR ALL ANDICAPPED CHILDREN ACT.

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NO.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROBERT and MARY YARIS, on their own behalf and as next friends of MICHAEL YARIS; STEPHEN and MARILYN STUBBS, on their own behalf and as next friends of ADAM STUBBS; and MISSOURI DEVELOPMENTAL DISABILITIES PROTECTION AND ADVOCACY SERVICES, INC., on behalf of all those similarly situated,

Petitioners,

v.

ARTHUR L. MALLORY, LEONARD W. HALL, DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION, and STATE BOARD OF EDUCATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CITATION TO OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals entered on January 13, 1986 is not reported and is printed in the Appendix.

The district court's Orders and Memoranda awarding plaintiffs certain costs and denying attorneys' fees, dated December 28, 1984, February 13, 1985, March 15, 1985, and April 18, 1985, and that court's decision on the merits, dated March 2, 1983 and reported at 558 F.Supp. 545 (E.D. Mo. 1983), aff'd., 728 F.2d 1055 (8th Cir. 1984), are printed in the Appendix.

JURISDICTIONAL STATEMENT

The judgment of the Eighth Circuit Court of Appeals was entered on January 13, 1986, affirming the district court's award of costs and denial of attorneys' fees. The jurisdiction of this Court is invoked under 28 U.S.C. §1254.

STATUTE INVOLVED

Section 505(b) of the Rehabilitation Act, 29 U.S.C. §794a(b) provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This is a class action lawsuit which established the right of handicapped children in the State of Missouri to attend summer school in order to receive a free appropriate public education and to be free from discrimination. The trial court found that the state defendants, respondents herein, were violating the Education for All Handicapped Children Act, 20 U.S.C. §§1401 et seq.; and §504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. **Yaris v. Special School District of St. Louis County,** 558 F.Supp. 545 (E.D. Mo. 1983), aff'd., 728 F.2d 1055 (8th cir. 1984).

The trial court concluded with respect to the Education for All Handicapped Children Act:

> [T]he State of Missouri is denying the plaintiff class a "free appropriate education" by failing to consider their educational needs in excess of the 180 day school year. 558 F.Supp. at 559.

The court then considered plaintiffs' separate discrimination claim under the Rehabilitation Act and stated:

> It must be concluded from the plain meaning of the statute that a state educational system which is in receipt of federal funds is in violation of the Rehabilitation Act if the entity's practices preclude the handicapped from obtaining benefits realized by the non-handicapped . . . Whatever benefits non-handicapped children realize when they attend summer school in Missouri are not available to the

> severely handicapped. By maintaining this policy the State of Missouri has violated the Rehabilitation Act on its face. Id. at 561.[1]

Plaintiffs filed a petition for an award of attorneys' fees and litigation expenses. Plaintiffs' counsel sought to recover fees for over 1,000 hours of attorney, paralegal and intern time. Plaintiffs also sought approximately $11,000.00 in costs and litigation expenses.

Relying primarily on **Smith v. Robinson,** ___ U.S. ___, 104 S.Ct. 3457 (1984) and **Irving Independent School District v. Tatro,** ___ U.S. ___, 104 S.Ct. 3371 (1984) the district court denied plaintiffs' request for attorneys' fees. Order and Memorandum, December 28, 1984.

On January 7, 1985 plaintiffs filed a motion to alter or amend that judgment, seeking (1) reconsideration of the denial of attorneys' fees and (2) an award of expenses. The district court on February 13, 1985 denied plaintiffs' motion with respect to attorneys' fees but granted the motion in part by awarding certain costs. Plaintiffs then submitted additional

---

[1]The court also held that the state defendants were violating the regulations promulgated pursuant to the Rehabilitation Act that require a free appropriate public education. Id.

documentation and sought reconsideration of a portion of the costs award pursuant to Rule 60(b), F.R.Civ.P. The court granted plaintiffs' motion and awarded additional costs in an Order and Memorandum dated March 15, 1985, amended Nunc Pro Tunc on April 8, 1985.

On appeal, the Court of Appeals for the Eighth Circuit affirmed the decisions of the district court.

ARGUMENT

PLAINTIFFS ARE ENTITLED TO AN AWARD OF ATTORNEYS' FEES AND EXPENSES AS PREVAILING PARTIES UNDER THE REHABILITATION ACT ON A CLAIM THAT COULD NOT HAVE BEEN LITIGATED UNDER THE EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

As prevailing parties under §504 of the Rehabilitation Act, 29 U.S.C. §794, plaintiffs are entitled to an award of reasonable attorneys' fees and the necessary expenses of litigation. Plaintiffs obtained a judgment under §504 that the state defendants were violating the rights of handicapped children throughout Missouri. **Yaris v. Special School District of St. Louis County**, 558 F.Supp. 545, 561 (E.D. Mo. 1983). Section 505(b) of the Rehabilitation Act, 29 U.S.C. §794a(b), expressly provides for an award of attorneys' fees to prevailing parties in actions under §504.[2]

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[2]Plaintiffs reserve their right to reassert their claims for fees and expenses under the Education for All Handicapped Children Act should the Act be amended by Congress to make such claims viable. Proposed legislation to that effect is pending in conference committee. S.B. 415; HR 1523.

The lower courts denied plaintiffs recovery of attorneys' fees by misapplying this Court's decisions in **Smith v. Robinson,** ___ U.S. ___, 104 S.Ct. 3457 (1984) and **Irving Independent School District v. Tatro,** ___ U.S. ___, 104 S.Ct. 3371 (1984). The conflict with those decisions justifies review in this Court.

In **Smith,** this Court clearly recognizes that there are §504 claims that are not covered by the Education for All Handicapped Children Act (EHA) and for which attorneys' fees may be recovered. With regard to §504 the Court states:

> We emphasize the narrowness of our holding. We do not address a situation where the EHA is not available or where §504 guarantees substantive rights greater than those available under the EHA. 104 S.Ct. at 3474.

Earlier in its discussion of §504 the Court addresses the precise situation present here:

> Of course, if a State provided services beyond those required by the EHA, but discriminatorily denied those services to a handicapped child, §504 would remain available to the child as an avenue of relief. Id. at 3473 n. 22.

Throughout this litigation plaintiffs have asserted two distinct theoretical bases for their claim that the denial of summer school programming for handicapped children was unlawful. In their claim covered by the

EHA, plaintiffs asserted that individual handicapped children were being deprived of a free appropriate public education because of defendants' refusal to consider their individual need for extended school year programming. Secondly, in their §504, non-EHA claim plaintiffs asserted that handicapped children were being discriminatorily excluded from state-funded summer school programs for non-handicapped children.

With respect to plaintiffs' §504 discrimination claim the district court found:

> Summer school is provided to children in Missouri at the option of local school districts. Some local school districts have made summer programs available to handicapped children. However, none of these programs are available for those children who have been designated as "severely handicapped" under Missouri law and who are enrolled in the state schools for the severely handicapped. 558 F.Supp. at 550.

After discussing the state's funding scheme with respect to summer school the court concluded:

> [T]he fiscal policies of the State of Missouri allow for the provision of services to the non-handicapped children during the summer months and do not allow for the provision of programming for the severely handicapped. . . . Therefore, although the state defendants' policy toward summer programming of children in Missouri is perhaps neutral on its face, it has the effect of providing services to non-handicapped children, which are denied to

> the handicapped and severely handicapped. 558 F.Supp. at 550-51.

Based on those factual findings the court held:

> It must be concluded from the plain meaning of the statute that a state educational system which is in receipt of federal funds is in violation of the Rehabilitation Act if the entity's practices preclude the handicapped from obtaining benefits realized by the non-handicapped. . . . Whatever benefits non-handicapped children realize when they attend summer school in Missouri are not available to the severely handicapped. By maintaining this policy the State of Missouri has violated the Rehabilitation Act on its face. 558 F.Supp. at 561.

That conclusion could not have been reached under the EHA. In denying plaintiffs' claim for attorneys' fees the trial court erred as a matter of law when it stated: "The EHA was available to remedy plaintiffs' allegation that the state defendants were discriminatorily denying services to handicapped children that were being provided to non-handicapped children." Memorandum, December 28, 1984, at 16 (emphasis in original). The court failed to recognize the distinction required by **Smith.**

In order to prevail on their free appropriate public education theory plaintiffs had to show that defendants' policies precluded individual consideration of need, and that the denial of summer programming deprived

handicapped children of educational benefits. This Court held in **Board of Education v. Hendrick Hudson Central School District v. Rowley,** ___ U.S. ___, 73 L.Ed.2d 690 (1982), that the appropriate education requirement contains both a procedural mandate of individual consideration, and a substantive standard of education benefit. See, **Yaris,** 558 F.Supp. at 557-58.

In contrast, the facial violation of the Rehabilitation Act was based on the fact that the State was funding summer programs in public schools for non-handicapped children, but some handicapped children, and all severely handicapped children attending state schools, were excluded. 558 F.Supp. at 550-51. The court concluded: "Whatever benefits non-handicapped children realize when they attend summer school in Missouri are not available to the severely handicapped." 558 F.Supp. at 561. That conclusion was not based on a finding that the excluded children were deprived of an appropriate education or denied educational benefits, but that they were deprived of "[w]hatever benefits non-handicapped children realize." It was based simply on a complete exclusion of handicapped children from a program or activity solely because of their handicapping condition. The same sort of violation could have been found if defendants excluded handicapped children from summer camps or park programs. Even if the trial court had agreed with defendants' expert witnesses and found that no handicapped children ever need summer school to receive an appropriate education, plaintiffs still would

have prevailed on their §504 discriminatory exclusion claim.[3]

Therefore, plaintiffs are entitled to an award of attorneys' fees for all efforts expended in connection with their successful Rehabilitation Act claim.

A holding by this Court that plaintiffs are entitled to an award of attorneys' fees under §505 of the Rehabilitation Act will require also a reversal for reconsideration of the award of costs and expenses under §505. Full recovery of the expenses of litigation is appropriate in civil rights cases where Congress has expressed its intent that prevailing plaintiffs and their counsel should be fully compensated for their efforts. See, **Jones v. Diamond**, 636 F.2d 1364, 1382 (5th Cir. en banc 1981), cert. dismissed, 102 S.Ct. 27 (1982); **Northcross v. Board of Education**, 611 F.2d 624, 639-40 (6th Cir. 1979); **Thornberry v. Delta Air Lines, Inc.**,

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[3]Plaintiffs prevailed under the Rehabilitation Act in two ways: under the statute "on its face," and under the regulations pertaining to elementary and secondary education. 558 F.Supp. at 560-61. The regulatory violation was based upon the fact that defendants' policies precluding individual consideration of each handicapped child's need for summer school programming violated the free appropriate public education requirement of the regulations. 558 F.Supp. at 561. This finding was equivalent to and based in part upon the court's conclusions under the EHA. Id.

676 F.2d 1240, 1244-45 (9th Cir. 1982); **Wheeler v. Durham City Board of Education,** 585 F.2d 618, 623-24 (4th Cir. 1978).

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 85-1316

Robert Yaris, and Mary on their own behalf and as next friends of Michael Yaris, and on behalf of all those similarly situated, Stephen Stubbs, Marilyn Stubbs, next of friend to Adams Stubbs, and Missouri Developmental Disabilities Protection and Advocacy Services, Inc.,	*	Appeal from the United States District Court for the Eastern District of Missouri
Appellants,	*	
v.	*	
Special School District of St. Louis County,	*	
Appellant,	*	
Arthur L. Mallory, Leonard W. Hall, Department of Elementary and Secondary Education, State Board of Education,	*	
Appellees.	*	

Submitted: October 17, 1985

Filed: January 13, 1986

Before ROSS, Circuit Judge, BRIGHT, Senior Circuit Judge, and BOWMAN, circuit Judge.

PER CURIAM.

This appeal relates to a class action lawsuit brought on behalf of handicapped children in the State of Missouri.[1] In Yaris v. Special School District of St. Louis County, 558 F. Supp. 545, 559-60 (E.D. Mo. 1983), aff'd, 728 F.2d 1055 (8th Cir. 1984), the district court determined that the State of Missouri's policy of refusing to provide more than 180 calendar days (nine months) of education per year for handicapped children denied those children a "free appropriate education" in violation of the Education for All Handicapped Children Act, 20 U.S.C. §§1401 et seq., and that the maintenance of such a policy also violated section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. The district court issued an injunction "prohibiting the continued application of a policy which refuses to consider the needs of the handicapped children for extended programming [including summer programming]." 558 F. Supp. at 564. The plaintiffs

[1] The plaintiffs in the original action included Robert and Mary Yaris, on their own behalf and as next friends of their handicapped son Michael Yaris, and on behalf of all those similarly situated; Stephen and Marilyn Stubbs, as next friends of their handicapped son Adam Stubbs; and Missouri Developmental Disabilities Protection and Advocacy Services, Inc.

appealed on grounds that the district court's injunctive relief was not specific enough, and that the district court erred in finding no liability against defendant Special School District of St. Louis County (Special School District or SSD). We affirmed. 728 F.2d at 1057.

The district court retained jurisdiction over the action to ensure compliance with its decision. The present proceedings arise from motions made by the plaintiffs and the Special School District to obtain additional funding from the State defendants[2] for summer programs for handicapped children, and for attorneys' fees and costs. The relief requests made to the district court were as follows:

> (1) That exceptional pupil aid under [Mo. Ann. Stat. §162.975 (Vernon Supp. 1985-1986)] also be available for summer programming, adjusted equitably on the basis of the proportion of hours of instruction in the summer program as compared to the hours of instruction during the regular school year. For example, if a local school district is entitled to $10,000 per class during the regular school year of 1,080 hours, a local school district with a class during the summer with 120 hours

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[2] The "State defendants" are the Department of Elementary and Secondary Education, the State Board of Education, Arthur L. Mallory (the Commissioner of Education), and Leonard W. Hall (the Assistant Commissioner for Special Education).

would be reimbursed on the basis of 120/1,080 X the $10,000 per class amount.

(2) That aid for contractual services be provided on the same proportionate per diem basis for summer programs as such aid is provided for regular school programs.

(3) That the State not be permitted to use discretionary P.L. 94-142 federal funds to defray the total cost of its summer programming to its severely handicapped children, but rather, any such funds be distributed directly to local school districts in the same manner as prior to the Yaris decision, in which the State provided 85% of its federal funds to local school districts.

(4) That the foregoing state aid be provided retroactive to the summer of 1983.

(5) For reasonable attorneys' fees and costs, and for such other and further relief as this Court deems just and appropriate.

The district court[3] denied the additional funding requests except for item (2), contractual services aid. In addition, the district court awarded plaintiffs costs in the amount of $3,747.64, but denied attorneys' fees to the plaintiff both for its successful injunction action and its limited success relating to the funding order.

---

[3] The Honorable John F. Nangle, Chief Judge, United States District Court for the Eastern District of Missouri.

The plaintiffs and the Special School District appeal from the district court's denial of their various funding requests, and the plaintiffs further appeal from the denial of an award of attorneys' fees.

The district court's rulings on funding may be summarized as follows:

1. Exceptional Pupil Aid. The district court observed that the parties disagree in the interpretation to be given to provisions of Missouri law[4] granting aid for handicapped children. The plaintiffs and the Special School District contend that such aid is limited to the regular school year, thus imposing a special financial burden on local districts which provide programming for handicapped children during the summer months. The

---

[4]The statute in question, Mo. Ann. Stat. §162.975 (Vernon Supp. 1985-1986), provides in pertinent part:

> 1. Each school district or special school district maintaining one or more approved special programs for handicapped or severely handicapped children under the provisions of sections 162.670 to 162.995 shall receive state aid at the rate of six thousand dollars for each approved class of children per term of one hundred eighty days as provided by section 163.012 * * *.

The statute defines a "class" as "a group of not less than ten children * * *." Mo. Ann. Stat. §162.975(6) (Vernon supp. 1985-1986).

State defendants disagree and assert that the allocation is made in a lump sum, not limited to 180 days. In denying additional aid, the district court stated in part:

> Because exceptional pupil aid is distributed as a lump sum, however, the only significant deterrent which results from §162.975 is that a local district that provides summer instruction may have to stretch its lump sum over twelve (12) months rather than nine (9) months.
>
> * * * *
>
> Two additional reasons support this Court's conclusion to refrain from altering the State's exceptional pupil aid scheme. The first is that two (2) summers have passed since this Court issued its opinion on the merits in this case, and no evidence was presented that any handicapped child identified as needing summer programming has been denied summer programming by a local district or by the State defendants. In the absence of such evidence, the efforts of plaintiffs and SSD herein must be viewed as an attempt to "bootstrap" from this Court that which they cannot obtain from the Missouri Legislature.
>
> The second reason is an amplification of the first. The sensitive balance of federal and state powers is seriously implicated whenever a federal court purports to regulate a state's fiscal decisions. Such an entanglement should not be created except where clearly necessary. In the absence of evidence that the State's current fiscal scheme results in the denial of summer school to any handicapped child who needs it, there is no clear necessity for this Court to tip the balance of state and federal power as it relates to educational funding.

> Accordingly, plaintiffs' and SSD's request that this Court adjust the amount of exceptional pupil aid provided under §162.975 be and is denied. (Footnote omitted).

2. Contractual Services Aid. The district court ordered the State defendants to provide contractual services aid to local districts for summer programming on the same basis as such aid is provided local districts for the regular year subject to the limit of $800 per year as specified in Mo. Rev. Stat. §162.980 (1978) (as amended). The plaintiffs and the Special School District have made no objection to this part of the district court's funding order.

3. Discretionary Pub. L. No. 94-142 Funds. The plaintiffs and the Special School District sought an order requiring the State defendants to increase its allocation of discretionary Pub. L. No. 94-142 funds to local school districts. The district court in denying this claim stated:

> The third item requested by plaintiffs and SSD is that this Court order the State defendants to provide 85% of its discretionary P.L. 94-142 funds to local districts. The factual basis for this request is summarized in ¶ 5 of the stipulation, as follows:
>
> > 5. Federal regulations require the State to distribute 75 percent of P.L. 94-142 federal funds to local educational agencies; up to 5 percent may be used for administrative purposes; the remaining 20 percent are

> discretionary funds. During FY 83 $19,001,680 was distributed to local educational agencies through the P.L. 94-142 entitlement formula. This represented 85 percent of the total P.L. 94-142 funds included in the FY 83 grant award. The FY 84 budget amount for local agency entitlement is $19,398,400. This represents 81 percent of the total P.L. 94-142 funds included in the FY 84 grant award.

Stipulation at 3. There are several reasons why plaintiffs' and SSD's third request must be denied.

First, if this Court were to order the State defendants to give 85% of their P.L. 94-142 funds to local districts, this Court would be obviating federal regulations which require the State to distribute only 75% of said funds to local districts. By giving 81% to local districts in 1984, the State gave 6% more than it was required to give. The portion labeled "discretionary" would no longer be discretionary if this Court granted the request at issue.

Second, although in 1984 the State reduced the percentage of P.L. 94-142 funds that it distributed to local districts from 85% to 81%, the total amount distributed actually increased significantly.

Third, the State's use of P.L. 94-142 funds is more like exceptional pupil aid for purposes of analyzing the request of plaintiffs and SSD. The State does not make any arbitrary distinction between the regular year and summer school with respect to P.L. 94-142 funds and there is no persuasive evidence that the State's

handling of P.L. 94-142 funds results in local districts refusing to consider the needs of handicapped children for summer school.

Finally, part of plaintiffs' and SSD's objection to the State's use of P.L. 94-142 funds stems from the fact that subsequent to this Court's decision on the merits, the State began using a portion of discretionary P.L. 94-142 funds to finance its own summer programming for severely handicapped children. However, plaintiffs' and SSD's objection is without merit. Not only did this Court's decision not preclude the State from providing summer programming on its own, but this Court expressly anticipated such an occurrence:

> [I]t is the conclusion of this court that it is the responsibility of the state educational agencies either to make sure that local agencies provide adequate services to handicapped children, or to provide these services.

Yaris v. Special School District of St. Louis County, 558 F.Supp. 545, 560 (E.D. Mo. 1983) (emphasis added) (citations omitted).

Accordingly, the third request of plaintiffs and SSD is denied.

4. Retroactive Funding Order. The court denied any retroactive application of its award of contractual services aid stating that "retroactivity is not warranted in this case * * *."

5. Attorneys' Fees. Finally, the district court denied the award of attorneys' fees to plaintiffs' counsel on grounds that all relief obtained by plaintiffs was available under the Education For All Handicapped Children Act, 20 U.S.C. §§1401 et seq., and as such no attorneys' fees could be awarded because relief might also lie under the Rehabilitation Act of 1973, 29 U.S.C. §794. The district court concluded that this result was compelled by the Supreme Court decision in Irving Independent School District v. Tatro, 104 S.Ct. 3371 (1984), and Smith v. Robinson, 104 S.Ct. 3457 (1984).

We have carefully considered the contentions of the parties. Finding no error of fact or law, we affirm on the well reasoned decisions of the district court contained in its unpublished memorandum of December 28, 1984, and its subsequent unpublished memorandum of February 13, 1985. See 8th Cir. R. 14.

A true copy

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT and MARY YARIS, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 81-423-C(1)**
SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, et al.,	)	
Defendants.	)	

NUNC PRO TUNC

IT IS HEREBY ORDERED that the motion of the State defendants and the Special School District of St. Louis County to alter or amend this Court's Order and Memorandum of March 15, 1985, be and is granted. Said Order and Memorandum is amended and the State defendants are taxed with plaintiffs' costs in the amount of $4,861.00, representing plaintiffs' expert witness fees only. When this amount is added to the costs taxed previously on February 13, 1985, in the amount of $3,747.64, the total cost award comes to $8,606.64.

S/S John F. Nangle

UNITED STATES DISTRICT JUDGE

Dated: April 8, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT and MARY YARIS, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 81-423-C(1)**
SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, et al.,	)	
Defendants.	)	

ORDER AND MEMORANDUM

IT IS HEREBY ORDERED that plaintiffs' motion to reconsider this Court's order taxing costs be and is granted. On February 13, 1985, this Court taxed defendants with plaintiffs' costs in the amount of $3,747.64. This Court denied plaintiffs' application to tax defendants with plaintiffs' expert witness fees and expenses in the amount of $6,274.75. The ground of said denial was the absence of sufficient documentation and itemization of said fees and expenses. Plaintiffs have now provided this Court with the appropriate supporting documentation. This Court holds that the expert witness fees and expenses incurred by plaintiffs were crucial or indispensible to presentation of their case. Paschall v. Kansas City Star Co., 695 F.2d 322, 338-39 (8th Cir. 1982). Accordingly, in addition to the $3,747.64 in costs taxed to defendants on February 13,

1985, defendants are also taxed with plaintiffs' costs in the amount of $6,274.75, representing plaintiffs' expert witness fees and expenses.

S/S John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: March 15, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT and MARY YARIS, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 81-423-C(1)**
SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, et al.,	)	
Defendants.	)	

ORDER

Pursuant to the Memorandum filed herein this day,

IT IS HEREBY ORDERED that plaintiffs' motion to alter or amend judgment entered December 28, 1984, be and is granted in part and denied in part. It is denied with respect to plaintiffs' attorneys' fees, but granted with respect to costs. The State defendants be and are taxed with plaintiffs' costs in the amount of $3,747.64.

IT IS FURTHER ORDERED that the State defendants' motion to amend order be and is granted and the state defendants need not provide contractual services aid in excess of the statutory maximum amount in Mo.Rev.Stat. §162.980 (1978 as amended).

S/S John F. Nangle

UNITED STATES DISTRICT JUDGE

Dated: February 13, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT and MARY YARIS, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 81-423-C(1)**
SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, et al.,	)	
Defendants.	)	

MEMORANDUM

This case is now before this Court on two (2) separate motions, both of which seek to amend or modify this Court's Order and Memorandum dated December 28, 1984. First, plaintiffs move to alter or amend said Order to: 1) award plaintiffs their costs and expenses incurred in connection with this lawsuit; and 2) award plaintiffs reasonable attorney's fees. Second, the State defendants move to amend said Order to provide that the yearly maximum for contractual services aid is $800.00 per student in accordance with §162.980 Mo.Rev.Stat.

This Court agrees with plaintiffs that they are entitled, as the prevailing party in this litigation, to an award of costs under Rule 54(d) and 28 U.S.C. §1920. The matter of costs was overlooked previously because

the parties gave the matter de minimus attention in their briefs and because plaintiffs did not file a formal bill of costs under 28 U.S.C. §1920. The matter of plaintiffs' costs will now be considered herein.

Plaintiffs' total costs were $10,947.67. This total includes the following categories: 1) depositions; 2) transcripts; 3) experts; 4) expenses of plaintiffs' counsel; 5) copying; 6) court costs; 7) postage; 8) long distance telephone calls; and 9) miscellaneous. The State defendants do not seriously object to $3,747.64 of plaintiffs' requested costs. The State defendants do object to: 1) $421.20 for certain depositions taken by plaintiffs; 2) $4,861.00 for expert witness fees; 3) $822.75 for plaintiffs' counsel's expenses; 4) $462.60 for copying; 5) $77.65 for postage; 6) $504.58 for long distance telephone calls; and 7) $50.25 for miscellaneous items. Because the State defendants do not object to $3,747.64 of the requested costs, said amount is awarded to plaintiffs and is taxed against the State defendants. The State defendants' objection to the amount of $421.20 for the depositions of Huskie, Holley, Williams, Nickels and Tucker is sustained because plaintiffs did not demonstrate to the satisfaction of this Court that said depositions were reasonably necessary to the prosecution of plaintiffs' case against the State defendants. Although this Court has discretion to award costs, including experts' fees, not specifically enumerated in 28 U.S.C. §1821, it is the exceptional case where such will be permitted. Paschall v. Kansas

City Star Co., 695 F.2d 322, 338-39 (8th Cir. 1982). In the case at bar, plaintiffs' experts were arguably crucial or indispensable to their case, as required by Paschall, but plaintiffs merely provided this Court with the name of the expert and the amount sought. Absent from the record is the rate of compensation or the precise services, i.e., consultation or testimony, for which compensation is sought. This Court cannot engage in any meaningful evaulation of the reasonableness of the amount sought on this record and therefore plaintiffs' experts' fees are not awarded. The State defendants' objection to the costs of copying is sustained for a similar reason, namely that the amount sought is not documented or itemized in such a way that this Court can meaningfully evaluate plaintiffs' request. The State defendants' objections to the remaining items are sustained because said items are not taxable as costs. See Wolf v. Wolfe, 570 F.Supp. 826, 828-29 (D. S.C. 1983) (expenses of attorneys, postage, long distance telephone calls and costs of legal research not taxable); Roche v. City of Normandy, 566 F.Supp. 37, 42 (E.D. Mo. 1983) (expenses of attorneys and expenses for serving subpoena not taxable); United States v. Bexar County, 89 F.R.D. 391, 394 n. 5 (W.D. Tex. 1981) (travel expenses of attorneys not taxable). Accordingly, the State defendants are taxed with plaintiffs' costs in the amount of $3,747.64.

The second component of plaintiffs' motion to amend was expressly rejected by this court's December 28,

1984, Order and Memorandum. This Court believes that said Memorandum adequately addressed plaintiffs' arguments and this court knows of no reason why it should be amended. Accordingly, the second component of plaintiffs' motion to amend is denied.

The State defendants' motion to amend relates to that portion of the December 28, 1984, Order and Memorandum which directed the State defendants to provide contractual services aid to local districts for summer programming on the same basis as they do for the regular year. In so ordering, this Court relied heavily on the following stipulation approved by all parties, including the State defendants:

> State aid for contracted services, reimbursed during the regular school year at $22.40 per student per day for approved programs, is not available for summer program contracted services.

Stipulation at 10. Now, the State defendants argue that Mo.Rev.Stat. §162.980 (1978 as amended), places an $800.00 annual limit on such aid. Section 162.980 provides, as follows:

> Each school district or special district shall receive up to $800 per year for each homebound child, child receiving special services outside the special class, or child served by contractual arrangement with a private or public agency.

Mo.Rev.State. §162.980 (1978 as amended).

The State defendants' motion to amend is granted and this Court's December 22, 1984 Order and Memorandum is amended to make it clear that the State of Missouri is not required to provide contractual services aid in excess of the $800.00 statutory maximum. This does not really constitute an amendment because this Court's prior Order merely required the State defendants to provide contractual services aid during the summer "on the same basis as they do during the regular year." The State defendants have admitted that, if the $800.00 statutory maximum is not met during the regular year, then the amount remaining shall be available for summer programming. Although the statutory maximum was not brought to this Court's attention earlier, this Court's prior Order did not, and was not intended to, override any such legitimate limit on aid.

S/S John F. Nangle

UNITED STATES DISTRICT JUDGE

Dated: February 13, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT and MARY YARES, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 81-423-C(1)**
SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, et al.,	)	
Defendants.	)	

ORDER

Pursuant to the Memorandum filed herein this day,

IT IS HEREBY ORDERED that the petition of plaintiffs and defendant Special School District of St. Louis County be and is denied in part and granted in part. Said petition is denied in all respects, except contractual services aid. With respect to contractual services aid, the State of Missouri and its agents shall provide contractual services aid to local districts educating handicapped children for summer progamming on the same basis as they do during the regular year. If summer programming consists of less than full-time classes, then the aid may be adjusted proportionately, such as by using hours rather than days for purposes of the calculation in the summer. To prevent the State of Missouri and its agents from evading the purpose of

this relief, it may not reduce the contractual services aid reimbursement rate of $22.40 per student per day between this date and December 31, 1986, except by leave of Court.

IT IS FURTHER ORDERED that plaintiffs' petition for an award of attorney's fees be and is denied.

S/S John F. Nangle
UNITED STATES DISTRICT JUDGE

Dated: December 28, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT and MARY YARIS, et al.,	)	
Plaintiffs,	)	
v.	)	**No. 81-423-C(1)**
SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, et al.,	)	
Defendants.	)	

MEMORANDUM

This case is once again before this Court on the petition of plaintiffs and defendant Special School District of St. Louis County (hereinafter SSD) for a funding order.[1] In addition, plaintiffs' application for an award of attorney's fees is presently before this Court.

1/Originally, plaintiffs' petition also included a motion to hold the state defendants in contempt. Said motion raised various non-monetary issues regarding the conduct of the state defendants subsequent to this Court's decision on the merits of this case. See Yaris v. Special School District of St. Louis County, 558 F.Supp. 545 (E.D. Mo. 1983). However, as a result of the parties' continuing negotiations plaintiffs moved to withdraw the non-monetary portions of their contempt motion. Because this Court previously granted said motio to withdraw, the only remaining aspect of plaintiffs'

I. PETITION FOR A FUNDING ORDER

The parties have eliminated many of the evidentiary deficiencies noted by this Court in the Order and Memorandum dated April 10, 1984. This has been achieved by filing a joint "Stipulation" and seperate supplemental memoranda. Perhaps the most useful part of this new material is the enumeration by plaintiffs and the SSD of five (5) specific types of relief that they seek from this Court. Plaintiffs and the SSD seek an order directing the State of Missouri to provide the following relief:

> (1) That exceptional pupil aid under §162.975 also be available for summer programming, adjusted equitably on the basis of the proportion of hours of instruction in the summer program as compared to the hours of instruction during the regular school year. For example, if a local school district is entitled to $10,000 per class during the regular school year of 1,080 hours, a local school district with a class during the summer with 120 hours would be reimbursed on the basis of 120/1,080 X the $10,000 per class amount.
>
> (2) That aid for contractual services be provided on the same proportionate per diem basis for summer programs as such aid is provided for regular school programs.
>
> (3) That the State not be permitted to use discretionary P.L. 94-142 federal funds to defray the total cost of its summer programming to its severely handicapped children, but rather, any such funds be

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(cont.)
petition is their request for a funding order.

distributed directly to local school districts in the same manner as prior to the Yaris decision, in which the State provided 85% of its federal funds to local school districts.

(4) That the foregoing State aid be provided retroactive to the summer of 1983.

(5) For reasonable attorneys' fees and costs, and for such other and further relief as this Court deems just and appropriate.

Supplemental Memorandum Of Plaintiffs And The Special School District Of St. Louis County In Support of Petition For Funding Order at 13-14. In the opinion of this Court, the above five (5)-point request is an appropriate basis for analyzing the need for a funding order in this case. A brief outline of the current educational fiscal structure in the State of Missouri will be helpful in such analysis.

During the regular nine (9)-month school year, local districts are eligible for State aid for both handicapped and non-handicapped students under the foundation formula, Mo.Rev.Stat. §§163.011, 163.031 (1978 as amended), and under provisions for transportation reimbursement, Mo.Rev.Stat. §163.161 (1978 as amended). The foundation formula calculates State aid on the basis of the number of students in attendance and the number of days classes are held on a full-time basis. Adjustments are made to include part-time

students and summer school students in the calculation of the "average daily attendance" figure.

Handicapped children are treated differently, fiscally speaking, than non-handicapped childen during both the regular and summer terms. During the summer term handicappd children are eligible for foundation formula aid so long as the summer session consists of a minimum of sixty (60) clock hours. 5 CSR 50-340.050(1). Summer programs for non-handicapped children are required to have a minimum of one hundred twenty (120) clock hours to be eligible for foundation formula aid. Id. Also, during the summer term handicapped children are eligible for transportation aid, whereas non-handicapped children are not. 5 CSR 50-340.050(7). During the regular school year handicapped children in local districts receive exceptional pupil aid, Mo.Rev.Stat. §162.975 (1978), and aid for contractual services, Mo.Rev.Stat. §162.980 (1978). Non-handicapped children, on the other hand, receive neither type of aid.

A. EXCEPTIONAL PUPIL AID

The first item, exceptional pupil aid under Mo.Rev.State. §162.975 (1978), is the most difficult one to analyze. Section 162.975 provides, in pertinent part, as follows:

> 1. Each school district or special school district maintaining one or more approved special programs for handicapped or severely handicapped childen under the provisions of sections 162.670 to 162.995 shall receive state aid at the rate of six thousand dollars for each approved class of children per term of one hundred eighty days as provided by section 168.021, RSMo, except that approved classes for the educable mentally retarded shall be funded at four thousand five hundred dollars per approved class, and approved classes of remedial reading shall be funded at three thousand five hundred dollars per approved class. The rates of reimbursement for approved classes in this subsection shall be adjusted annually by the same percent that the appropriation of state funds for the school foundation program is changed from the previous year.

(emphasis added). The statute defines a "class" as a "group of not less than ten children. . . ." Mo.Rev.Stat. §162.975(6) (1978). In the opinion dated March 2, 1983, this Court commented on §162.975, as follows:

> [S]tate aid for the education of the handicapped, in the form of funds provided by class, staff members and staff aid, is limited to a "term of one hundred eighty days" by Missouri State law. Mo.Rev.Stat. §162.975.

Yaris v. Special School District of St. Louis County, 558 F.Supp. 545, 550 (E.D. Mo. 1983) (emphasis added). Plaintiffs and defendant SSD also interpret §162.975 as "limiting" exceptional pupil aid to a term of one hundred eighty (180) days and argue that the "unavailability" of exceptional pupil aid during the summer months has the

effect of discouraging local districts from providing summer programs. This Court previously agreed with this argument, as follows:

> [I]n the event a local district wishes to provide handicapped children with education beyond the traditional 180 days, the local agency must bear the additional cost. The responsibility for this financial burden may very well deter a local district from considering the needs of handicapped childen for school in excess of 180 days. Therefore, although the state defendants' policy toward summer programming of children in Missouri is perhaps neutral on its face, it has the effect of providing services to non-handicapped children, which are denied to the handicapped and severely handicapped.

Id. at 550-51.

The State defendants, however, argue that "[p]etitioners' criticism is meaningless in the context of the statute." State Defendants' Supplemental Memorandum In Opposition To Petitions For Funding Order at 5. The basis of their argument is that, unlike foundation formula aid which is calculated by the number of students and days of attendance, exceptional pupil aid is a lump sum. The State defendants interpret the language, "per term of one hundred eighty days," Mo.Rev.Stat. §162.975 (1978), as merely a "minimum number of days a school district must have in their regular school calendar in order to qualify for state aid." Id. In addition, the State defendants argue that §162.975 does not deter local districts from considering

the needs of handicapped children for school in excess of 180 days, because "[n]othing prevents a local district from allocating its resources so as to utilize a percentage of the exceptional pupil aid it receives for summer school." Id. at 6.

This Court is persuaded by the arguments of the State defendants. To criticize §162.975 as "limiting" exceptional pupil aid to one hundred eighty (180) days is somewhat meaningless because of the manner in which the aid is distributed. A lump sum for each class of ten (10) children is far different from aid distributed on the basis of a formula that utilizes the total number of students and the total number of days or hours that they are in attendance. A true "limit" would exist if instructional time beyond one hundred eighty (180) days were not compensable or could not be included in the calculation. The one hundred eighty (180) day figure in §162.975 is not a true "limit" on the amount of aid available because time is simply not a variable in the calculation. Indeed, the amount of aid available is not subject to variation at all. In addition, the State defendants' reading of the one hundred eighty (180) day term as a minimum standard is reasonable and is also buttressed by the statute's reference to §163.021. That section is entitled "Eligibility for state aid -- requirements," and it sets out a host of minimum standards that must be met to be eligible for any state educational aid. Mo.Rev.Stat. §163.021 (1978 as amended). Finally, this Court is also persuaded that

any deterrence which results from the way §162.975 is structured is not significant enough to warrant interference with the state's fiscal decisions. A significant deterrent would exist if foundation formula aid were limited to one hundred eighty (180) days. In that situation, the State would be treating summer school different from the regular school year for handicapped children and the local districts would be receiving aid during the regular year that they wouldn't receive during the summer. Because exceptional pupil aid is distributed as a lump sum, however, the only significant deterrent which results from §162.975 is that a local district that provides summer instruction may have to stretch its lump sum over twelve (12) months rather than nine (9) months.

Focusing on this latter type of detterence also suggests an important reason why the request of plaintiffs and SSD must be denied. At the trial on the merits in this case, this Court did not try or purport to decide what amount of aid is necessary to provide an adequate education for handicapped children. Implicit in plaintiffs' and SSD's request that this Court proportionately increase the amount of exceptional pupil aid to account for summer school hours is the premise that the current lump sum is the amount needed to provide an adequate education for only nine (9) months. For example, in their brief plaintiffs and SSD assert that the fact that the State provides exceptional pupil aid and contractual services during the regular school

year evidences "the Missouri Legislature's acknowledgement that such additional aid is needed in order to provide handicapped children the same basic level of educational opportunity as non-handicapped children." Supplemental Memorandum Of Plaintiffs And The Special School District Of St. Louis County In Support Of Petitions For Funding Order at 4. While the fact that exceptional pupil aid exists may "evidence" said "acknowledgement" on the part of the State, it by no means establishes any given lump sum as the minimum amount of aid needed to provide handicapped children with an adequate education. Indeed, the lump sum provided as exceptional pupil aid has fluctuated over the past few years. In 1977 the amount was $6,000.00 for each class and in 1984 the amount is approximately $10,000.00 for each class. Because this Court did not try or decide what minimum level of State spending is required to comply with federal law, this Court lacks the power to prevent the State from reducing this amount to $9,000.00 or $8,000.00 in 1985. It follows that the relief requested by plaintiffs and SSD would ultimately prove ineffectual — even if this Court were to order the State to provide exceptional pupil aid in an amount that would be for summer school only, by proportionately increasing the lump sum based on the number of summer school hours, nothing would prevent the State from reducing the regular year lump sum to regulate the twelve (12) month total exceptional pupil aid. In addition, the request by plaintiffs and SSD injects a time variable into the distribution of

exceptional pupil aid. However, neither plaintiffs nor SSD have directed this Court's attention to any authority that requires the State to allocate its educational dollars on the basis of hours or days.

Two additional reasons support this Court's conclusion to refrain from altering the State's exceptional pupil aid scheme. The first is that two (2) summers have passed since this Court issued its opinion on the merits in this case, and no evidence was presented that any handicapped child identified as needing summer programming has been denied summer programming by a local district or by the State defendants.[2] In the absence of such evidence, the efforts of plaintiffs and SSD herein must be viewed as an attempt to "bootstrap" from this Court that which they cannot obtain from the Missouri Legislature.

The second reason is an amplication of the first. The sensitive balance of federal and state powers is seriously implicated whenever a federal court purports to regulate a state's fiscal decisions. Such an

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2/In fact, a footnote in one of plaintiffs' memoranda concerning attorney's fees indicates that the two (2) primary handicapped children plaintiffs in this case, Michael Yaris and Adam Stubbs, received summer school programming at public expense in 1983 and 1984. Plaintiffs' Reply Memorandum Regarding Attorneys' Fees And Expenses at 2 n. 1.

entanglement should not be created except where clearly necessary. In the absence of evidence that the State's current fiscal scheme results in the denial of summer school to any handicapped child who needs it, there is no clear necessity for this Court to tip the balance of state and federal power as it relates to educational funding.

Accordingly, plaintiffs' and SSD's request that this Court adjust the amount of exceptional pupil aid provided under §162.975 be and is denied.

B. CONTRACTUAL SERVICES AID

The second item requested by plaintiffs and SSD is that so-called "contractual services aid" be available during the summer on the same basis that it is available during the regular school year. Contractual services aid is markedly different from exceptional pupil aid. Paragraph 21 of the stipulation filed herein states, as follows:

> State aid for contracted services, reimbursed during the regular school year at $22.40 per student per day for approved programs, is not available for summer program contracted services.

Stipulation at 10. Thus, contractual services aid differs from exceptional pupil aid in that the former is distributed as a given amount per unit of time and the time component is limited to the nine (9)-month academic year, whereas neither is true of exceptional pupil aid.

The State defendants have not suggested any rational basis for distinguishing between summer school and the regular term for purposes of distributing contractual services aid. Because it is so limited, it is likely to produce a significant deterrent to local districts who must provide summer school to handicapped children who need extended programming. By making this distinction the State defendants have not met their "responsibility . . . to make sure that local agencies provide adequate services to handicapped children. . . ." Yaris v. Special School District of St. Louis County, 558 F.Supp. 545, 560 (E.D. Mo. 1983). Unlike exceptional pupil aid, there is a clear necessity to order the State defendants to make contractual services aid availability to local districts for summer programming.

Accordingly, the State defendants shall be ordered to provide contractual services aid to local districts for summer programming on the same basis as they do for the regular year. If summer programming consists of less than full-time classes, then the aid may be adjusted proportionately, such as by using hours rather than days for purposes of the calculation in the summer. To prevent the State from evading the purpose of this relief, it may not reduce the reimbursement rate of $22.40 per student per day between now and December 31, 1986, except by leave of Court.

C. DISCRETIONARY P.L. 94-142 FUNDS

The third item requested by plaintiffs and SSD is that this Court order the State defendants to provide 85% of its discretionary P.L. 94-142 funds to local districts. The factual basis for this request is summarized in ¶ 5 of the stipulation, as follows:

> 5. Federal regulations require the State to distribute 75 percent of P.L. 94-142 federal funds to local educational agencies; up to 5 percent may be used for administrative purposes; the remaining 20 percent are discretionary funds. During FY 83 $19,001,680 was distributed to local educational agencies through the P.L. 94-142 entitlement formula. This represented 85 percent of the total P.L. 94-142 funds included in the FY 83 grant award. The FY 84 budget amount for local agency entitlement is $19,398,400. This represents 81 percent of the total P.L. 94-142 funds included in the FY 84 grant award.

Stipulation at 3. There are several reasons why plaintiffs' and SSD's third request must be denied.

First, if this Court were to order the State defendants to give 85% of their P.L. 94-142 funds to local districts, this Court would be obviating federal regulations which require the State to distribute only 75% of said funds to local districts. By giving 81% to local districts in 1984, the State gave 6% more than it was required to give. The portion labeled "discretionary"

would no longer be discretionary if this Court granted the request at issue.

Second, although in 1984 the State reduced the percentage of P.L. 94-142 funds that it distributed to local districts from 85% to 81%, the total amount distributed actually increased significantly.

Third, the State's use of P.L. 94-142 funds is more like exceptional pupil aid for purposes of analyzing the request of plaintiffs and SSD. The State does not make any arbitrary distinction between the regular year and summer school with respect to P.L. 94-142 funds and there is no persuasive evidence that the State's handling of P.L. 94-142 funds results in local districts refusing to consider the needs of handicapped children for summer school.

Finally, part of plaintiffs' and SSD's objection to the State's use of P.L. 94-142 funds stems from the fact that subsequent to this Court's decision on the merits, the State began using a portion of discretionary P.L. 94-142 funds to finance its own summer programming for severely handicapped children. However, plaintiffs' and SSD's objection is without merit. Not only did this Court's decision not preclude the State from providing summer programming on its own, but this Court expressly anticipated such an occurrence:

> [I]t is the conclusion of this Court that it is the responsibility of the state educational agencies either to make sure that local agencies provide adequate services to handicapped children, or to provide these services.

Yaris v. Special School District of St. Louis County, 558 F.Supp. 545, 560 (E.D. Mo. 1983) (emphasis added) (citations omitted).

Accordingly, the third request of plaintiffs and SSD is denied.

D. RETROACTIVE FUNDING ORDER

The fourth request of plaintiffs and SSD is that any funding order issued by this Court be retroactive to the summer of 1983. In the opinion of this Court retroactivity is not warranted in this case and therefore the fourth item is denied.

E. ATTORNEY'S FEES AND COSTS

The final item is the request of plaintiffs and SSD for an award of attorney's fees and costs incurred in connection with their request for a funding order. As explained more fully infra, plaintiffs' counsel is not entitled to an award of attorney's fees for his work on the case in chief due to the Supreme Court's recent decisions in Smith v. Robinson, ___ U.S. ___, 104 S.Ct. 3457 (1984), and Irving Independent School District v. Tatro, ___ U.S. ___, 104 S.Ct. 3371 (1984). The essence of these decisions is that the Rehabilitation Act of

1973, as amended, 29 U.S.C. §794, "is inapplicable when relief is available under the Education of the Handicapped Act [EHA] to remedy a denial of educational services." Tatro, ___ U.S. at ___, 104 S.Ct. at 3379. With respect to the only relief granted herein to plaintiffs and SSD as a result of their petition for a funding order, i.e., contractual services aid, the basis of said relief is the EHA and not the Rehabilitation Act. Moreover, the evidence submitted in the stipulation convinces this Court that the State of Missouri is not discriminating against handicapped children in favor of non-handicapped children with respect to summer school funding by State or Federal dollars. See Stipulation ¶11. The State's allocation of contractual services aid violates the EHA because it deters local districts from considering the needs of handicapped children for summer programming. Because a funding order with respect to contractual services aid "is available under the Education of the Handicapped Act," the Rehabilitation Act is "inapplicable" and attorney's fees are not recoverable. Tatro, U.S. at ___, 104 S.Ct. at 3379.

II. ATTORNEY'S FEES

In February of 1984, the Eighth Circuit, in a per curiam opinion, affirmed this Court's judgment in the case at bar. Shortly thereafter, plaintiffs filed their petition for an award of attorney's fees. This Court held a hearing on said petition in late Spring of 1984. Post-hearing brief, including plaintiffs' reply, were filed

by July 6, 1984. However, on July 5, 1984 the Supreme Court handed down two decisions which impact heavily on plaintiffs' petition for attorney's fees: Smith v. Robinson, ___ U.S. ___, 104 S.Ct 3457 (1984); Irving Independent School District v. Tatro, ___ U.S. ___, 104 S.Ct. 3371 (1984). The parties have addressed the significance of these two (2) cases in letters to this Court. It is the opinion of this Court that Smith and Tatro prevent plaintiffs from recovering attorney's fees in the case at bar.

In Smith, the parents of a child suffering from cerebral palsy contested a school district's refusal to fund the child's placement in a special education program. The parents challenged the constitutionality of the procedure utilized to make the school district's decision and the substance of that decision. Their suit in Federal District Court sought declaratory and injunctive relief based on state law; the Education of the Handicapped Act (EHA), 20 U.S.C. ¶¶1401, et seq.; ¶504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. ¶794; and 42 U.S.C. ¶1983. The District Court declared that the procedure violated federal due process requirements and that, as a matter of state law, defendants were obligated to pay for the child's education. Although the District Court did not decide plaintiffs' federal statutory and constitutional claims relating to his substantive challenge, it awarded attorney's fees to plaintiffs under 42 U.S.C. ¶1988 and ¶505 of the Rehabilitation Act of 1973, as amended,

29 U.S.C. ¶795, because the unaddressed federal claims were substantial and nonfrivolous. On plaintiffs' appeal from the Court of Appeals' reversal of the attorney's fees award, the Supreme Court held that plaintiffs were not entitled to fees under either §1988 or §505, because the relief obtained by plaintiffs was available under the EHA.

The Supreme Court in Smith reasoned that Congress intended the EHA to be the exclusive avenue for litigating a handicapped child's right to a free appropriate public education. Smith, ___ U.S. at ___, 104 S.Ct. at 3468. The Court further reasoned that by creating a comprehensive remedial scheme in the EHA, which did not include a right to attorneys' fees, Congress did not intend for litigants to circumvent that scheme by bringing EHA claims together with analogous §1983 and Rehabilitation Act claims and then claiming attorneys' fees under the latter two (2) statutes. Id. at 3469, 3472. With respect to the Smith plaintiffs' equal protection claim under §1983, the Court concluded:

> that where the EHA is available to a handicapped child asserting a right to a free appropriate public education, based either on the EHA or on the Equal Protection Clause of the Fourteenth Amendment, the EHA is the exclusive avenue through which the child and his parents or guardian can pursue their claim.

Id. at 3470.

With respect to the Rehabilitation Act claim, the Court employed a similar, but different, analysis. Id. at 3472. The Court noted that although the Rehabilitation Act and the EHA are different substantive statutes, both statutes, "as applied to the right of a handicapped child to a public education, have been interpreted to be strikingly similar." Id. However, the Court stated that "[t]he significant difference between the two, as applied to special education claims, is that the substantive and procedural rights assumed to be guaranteed by both statutes are specifically required only by the EHA." Id. (emphasis added). From this specificity, the Court concluded that "Congress did not intend a handicapped child to be able to circumvent the requirements or supplement the remedies of the EHA by resort to the general antidiscrimination provision of §504." Id. at 3473. The Court summarized its holding, as follows:

> [W]here, as here, whatever remedy might be provided under §504 is provided with more clarity and precision under the EHA, a plaintiff may not circumvent or enlarge on the remedies available under the EHA by resort to §504.

Id. at 3474. In Smith, because the relief obtained by the plaintiffs was available under the EHA and, thus, §504 was not available as an alternative basis for said relief, the plaintiffs were not entitled to attorneys' fees under §505 of the Rehabilitation Act. Id.

In Tatro, the companion case to Smith, a handicapped child was being educated at public expense by defendants. However, defendants did not make provision for school personnel to administer a procedure to plaintiff, which she required to avoid injury to her kidneys, known as "clean intermittent catheterization" (CIC). The plaintiff brought suit in federal District Court alleging that defendants' refusal to provide CIC services violated the EHA and §504 of the Rehabilitation Act. The District Court held that defendants' refusal violated both statutes and awarded attorney's fees under §505 of the Rehabilitation Act. On appeal, the Supreme Court applied Smith and reversed the award of attorneys' fees, as follows:

> We hold today, in Smith v. Robinson, . . ., that §504 is inapplicable when relief is available under the Education of the Handicapped Act to remedy a denial of educational services. Respondents are therefore not entitled to relief under §504, and we reverse the Court of Appeals' holding that respondents are entitled to recover attorney's fees.

Tatro, ___ U.S. at ___, 104 S.Ct. at 3379.

In the case at bar, plaintiffs initially relied on the EHA, the Rehabilitation Act, §1983 (the Equal Protection and Due Process Clauses of the Fourteenth Amendment), and Missouri constitutional and statutory provisions. Yaris, 558 F.Supp. 545, 546 (E.D. Mo. 1983). This Court granted injunctive relief to plaintiffs under the EHA and the Rehabilitation Act, but declined to

pass on plaintiffs' other asserted bases for relief. Id. at 563. This Court held that the state defendants' policy of limiting education for handicapped children to nine (9) months violated both the EHA and the Rehabilitation Act and granted declaratory and injunctive relief. Id. at 564. Plaintiffs seek an award of attorney's fees under 42 U.S.C. §1988 on the basis of their unaddressed constitutional claims and under 29 U.S.C. §795 on the basis of their successful Rehabilitation Act claim.

Even though this Court did not pass on plaintiffs' Equal Protection and Due Process claims, pre-Smith decisions in the Eighth Circuit support an award of attorney's fees. In Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1982), cert. denied, 460 U.S. 1012 (1983), the Court of Appeals stated:

> It does not matter that the constitutional, or §1983, ground was not actually reached, and that the complainant prevailed, to the extent that he did at all, on his [EHA] ground. Where a non-fee claim is joined with a non-frivolous claim under a statute providing for the award of fees, and the plaintiff prevails with respect to his non-fee claim, thus making it unnecessary to reach the §1983 claim, an award of fees is nevertheless appropriate.

Id. at 1172. See also, Robert M. v. Benton, 671 F.2d 1104 (8th Cir. 1982). However, as the Eighth Circuit recently ackowledged, the validity of Monahan and Benton has been undermined by Smith with respect to Equal Protection claims where relief is available under

the EHA. See Rose v. State of Nebraska, Nos. 83-2678 et al., slip op. at 12 (8th Cir. November 26, 1984). Smith held that "Congress intended the EHA to be the exclusive avenue through which a plaintiff may assert an equal protection claim to a publicly financed special education." Smith, ___ U.S. at ___, 104 S.Ct. at 3468. With respect to Due Process claims, on the other hand, the Smith Court declined to decide "whether the procedural safeguards set out in the EHA manifest Congress' intent to preclude resort to §1983 on a due process challenge . . . ." Id. at ___, 104 S.Ct. at 3470. Smith disposed of the right to attorney's fees for the Due Process claim therein by holding that the "due process claim and the substantive claim on which petitioners ultimately prevailed involved entirely separate legal theories and, more important, would have warranted entirely different relief." Id. at ____, 104 S.Ct. at 3471. The Eighth Circuit recently interpreted dicta in Smith to conclude that a successful EHA plaintiff can recover attorney's fees where: 1) a substantial, but unaddressed, Due Process claim was asserted; and 2) the facts and theory of the Due Process claim were the same as those of the EHA claim. Rose v. State of Nebraska, Nos. 83-2678 et al., slip op. at 12-14 (8th Cir. November 26, 1984). The plaintiffs in Rose, as in Monahan and Benton, challenged the impartiality of the EHA hearing process and sought a second hearing for themselves.

In the opinion of this Court, however, neither Rose nor Monahan and Benton entitle plaintiffs herein to attorney's fees on the basis of their Due Process claim. Unlike Rose, this was not a case "where plaintiffs . . . had to resort to judicial relief to force the agencies to provide them the process they were constitutionally due." Smith, ___ U.S. at ___, 104 S.Ct. at 3471 n. 17. Plaintiffs herein did allege that the SSD should have paid for the costs of a copy of the record and transcript of the panel level hearing for review by the State Board of Education, but that claim was far from being the same as plaintiffs' EHA claim. Plaintiffs' EHA claim was that the nine (9)-month policy deprived them of a free appropriate education and discriminated against them. While this claim could arguably be characterized as an Equal Protection claim, it is not a substantial Due Process claim. Unlike a "due process challenge to state procedures," a nominal Due Process challenge to state substantive criteria is clearly "inconsistent with the EHA's comprehensive scheme." Smith, ___ U.S. at ___, 104 S.Ct. 3471 n. 17. Accordingly, plaintiffs' constitutional claims do not entitle them to an award of attorney's fees under 42 U.S.C. §1988.

Turning to plaintiffs' right to an award of fees under the Rehabilitation Act, it is the opinion of this Court that because the relief obtained by plaintiffs was available under the EHA, Smith and Tatro render §504 of the Rehabilitation Act inapplicable and, thus, plaintiffs are not entitled to attorney's fees. Plaintiffs

argue that two passages in Smith warrant a contrary result. The first passage was, as follows:

> We emphasize the narrowness of our holding. We do not address a situation where the EHA is not available or where §504 guarantees substantive rights greater than those available under the EHA.

Smith, ___ U.S. at ____, 104 S.Ct. at 3474. This passage, however, does not support plaintiffs' argument. The EHA was available to remedy plaintiffs' allegation that the state defendants were discriminatorily denying services to handicapped children that were being provided to non-handicapped children. Indeed, this Court's opinion expressly held that said discrimination violated the EHA. Yaris, 558 F.Supp. at 559. Moreover, the Rehabilitation Act did not guarantee substantive rights "greater" than those available under the EHA. Here, the discriminatory actions of the state defendants violated both the EHA and the Rehabilitation Act, but plaintiffs would have obtained exactly the same relief if the Rehabilitation Act claim had not been made. It is precisely this type of remedial overlap that triggers application of the Smith rule in cases concerning the educational rights of handicapped children. Plaintiffs argue that under the Rehabilitation Act they asserted "substantive rights greater than those available under the EHA," because under the EHA they challenged the nine (9) month policy whereas under the Rehabilitation Act they challenged the State's discriminatory funding policy. However, there is no meaningful distinction

between these two claims because the funding policy was merely a manifestation of the nine (9) month policy.

The second passage that plaintiffs rely on was, as follows:

> Of course, if a state provided services beyond those required by the EHA, but discriminatorily denied those services to a handicapped child, §504 would remain available to the child as an avenue of relief.

Smith, ___ U.S. ___ n. 22, 104 S.Ct. at 3473 n. 22. This passage also does not support plaintiffs' position. The allegations and findings in this case were that the state defendants were not meeting their EHA obligations and that said default also violated the Rehabilitation Act. This case is clearly not the type of situation, contrary to plaintiffs' argument, countenanced by footnote 22 in Smith.

This Court is mindful of the hardship imposed on plaintiffs' counsel as a result of Smith and Tatro. Said counsel is a highly skilled practitioner and reasonably expended over one thousand (1000) hours in litigating this action. The result achieved provided and will provide substantial benefits to plaintiffs and other similarly situated handicapped children. Nevertheless, it is the intention of Congress, as construed by the Supreme Court in Smith and Tatro, that said efforts not be compensated monetarily. Such a result may seem harsh, and perhaps illogical, but Congress struck

the balance between encouraging private enforcement of the educational rights of handicapped children and ensuring that dollars earmarked for education actually are spent on education rather than attorney's fees in favor of the latter. Accordingly, plaintiffs' petition for an award of attorney's fees be and is denied.

S/S John F. Nangle

UNITED STATES DISTRICT JUDGE

Dated: December 28, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT and MARY YARIS, et al.,	)	
Plaintiffs,	)	
v.	)	No. 81-423-C(2)
SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, et al.,	)	
Defendants.	)	

ORDER

Pursuant to the memorandum filed herein this day,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that plaintiffs shall have judgment against defendant Special School District on Count I of the first amended complaint in the amount of $388.70.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiffs' class shall have judgment against the state defendants on Count II of the First amended complaint.

IT IS FURTHER ORDERED that a hearing shall be held on the question of attorneys fees.

S/S John F. Nangle
United States District Judge

Dated: March 3, 1983

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

ROBERT and MARY YARIS, et al.,	)	
Plaintiffs,	)	
v.	)	No. 81-423-C(2)
SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, et al.,	)	
Defendants.	)	

MEMORANDUM

This is a class action lawsuit to redress alleged deprivation of rights under the Education For All Handicapped Children Act, 20 U.S.C. §§1401 et seq.; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794; 42 U.S.C. §1983, the Equal Protection and Due Process Clauses of the Fourteenth Amendment; the Missouri Constitution, and Mo. Rev. Stat. §§162.670 et seq.[1] This court's jurisdiction is

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[1]The gravemen of the complaint is found in Count II in which the class of handicapped children and their parents contest a policy and practice of refusing to provide or consider providing educational services for handicapped children in excess of 9 months a year. In Count I, plaintiffs Robert and Mary Yaris bring an individual action on their own behalf, and on behalf of their minor son, against the Special School District for

invoked pursuant to 20 U.S.C. §1415(e), 28 U.S.C. §1331, and 28 U.S.C. §1343. The named plaintiffs instituted this suit to secure declaratory and injunctive relief against the continued application of the defendants' policy, which precludes the provision of educational programs for handicapped children in excess of the traditional 9 month school year. Furthermore, plaintiffs seek a mandatory injunction compelling defendants to make available to the named plaintiffs an educational program that extends beyond 9 months. Plaintiffs allege that defendants have a policy against considering or providing handicapped children with educational services beyond the regular 9 month term, and therefore defendants are not meeting their obligations under applicable federal and state statutes.

This case was tried to the court sitting without a jury. The court having considered the pleadings, the testimony of the witnesses, the documents in evidence, and the stipulations of the parties, and being fully advised in the premises, hereby makes the following

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(cont.)
failing to provide their son with an appropriate education. The plaintiffs allege the defendant is in violation of the Rehabilitation Act, 29 U.S.C. §794, 42 U.S.C. §1983, and Missouri State law due to its failure to implement any educational program for Michael Yaris in a timely manner, and due to its failure to pay for some of the costs incurred by the Yarises in the administrative proceedings; in the latter count the plaintiffs seek injunctive, declaratory, and monetary relief.

findings of fact and conclusions of law, as required by Rule 52 of the Federal Rules of Civil Procedure.

FINDINGS OF FACT

1. Plaintiff Michael Yaris, born February 26, 1971, is a handicapped child who resides with his parents, plaintiffs Robert and Mary Yaris in University City, St. Louis County, Missouri. Robert and Mary Yaris have been authorized in this litigation to serve as next friends of their son Michael.

2. Plaintiff Adams Stubbs, born December 9, 1974, is a handicapped child, who resides with his parents, plaintiffs Stephen and Marilyn Stubbs, in Independence, Missouri. Stephen and Marilyn Stubbs have been authorized in this litigation to serve as next friends of their son Adam.

3. Plaintiff Missouri Development Disabilities and Advocacy Services, Inc. (hereinafter "Missouri P&A") is a not-for-profit corporation having its principal place of business in Jefferson City, Missouri. Pursuant to the Developmental Disabilities Act, 42 U.S.C. §§6601, et seq., Missouri P&A is the agency within the State of Missouri charged with the responsibility of advocating for the rights, including educational rights, of persons in the State of Missouri who are developmentally disabled. Funding for Missouri P&A is provided by the Developmental Disabilities Office of the United States Department of Health and Human Services.

4. Defendant Special School District of St. Louis County (hereinafter "SSD") is a body corporate and political subdivision of the State of Missouri and may be sued in its own name. This defendant, among other things, operates schools for the education of the handicapped throughout St. Louis County, Missouri. Said defendant is a recipient of federal financial assistance, including assistance under the Education For All Handicapped Children Act of 1975, 20 U.S.C. §§1401, et seq., (P.L. 94-142).

5. Defendant Department of Elementary and Secondary Education (hereinafter "DESE") is a department of the executive branch of the State of Missouri. DESE is responsible under the Education For All Handicapped Children Act of 1975, 20 U.S.C. §§1401, et seq., for ensuring that all handicapped children in Missouri receive a free and appropriate public education. As part of that responsibility, DESE supervises all local school districts and other state agencies in their provision of a free and appropriate public education to Missouri handicapped children. DESE also is responsible for establishing procedural safeguards to assure that such an education is provided. The duties of DESE include supervision over the distribution of state and federal funds to local school districts for use in the education of handicapped children. DESE is responsible under Missouri law for assuring that all handicapped children within the State of Missouri are provided access to special educational services. DESE is a recipient of

federal financial assistance for the education of handicapped children; the department receives funds under the Education For All Handicapped Children Act of 1975; 20 U.S.C. §§1401, et seq.

6. Defendant State Board of Education was created by the Missouri Constitution, Article 9, Section 2(a). The Board is required to carry out the educational policies of the State of Missouri relating to public schools that are provided by law and to supervise instruction in the public schools.

7. Defendant Arthur L. Mallory is the Commissioner of Education of the State of Missouri, a position established by the Missouri Constitution. Defendant Mallory is the chief administrative officer of the State Board of Education and has supervisory authority over the DESE.

8. Defendant Leonard W. Hall is the Assistant Commissioner for the Division of Special Education of the DESE. Dr. Hall's duties and responsibilities include supervision of the operation of all state schools for handicapped children and the monitoring of all special education programs operated by local school districts to assure compliance with federal and state laws pertaining to education for the handicapped.

9. By order of this court dated December 30, 1982, the named plaintiffs in this action, the Yarises, the

Stubbs, and the Missouri P&A, were authorized to proceed against the state defendants, Arthur L. Mallory, Leonard W. Hall, State Board of Education and DESE, as representatives of a class defined as follows:

> All handicapped school-aged persons in the State of Missouri who require or may require or benefit from an educational program in excess of the traditional nine-month school year and with no extended break in programming, and the parents or guardians of such persons.

In addition, the Yaris plaintiffs and Missouri P&A also were authorized to proceed against defendant SSD as representatives of a sub-class defined as follows:

> All handicapped school-aged persons which defendant Special School District of St. Louis County is obligated to serve who require or may require an educational program in excess of the traditional nine-month school year and with no extended break in programming, and the parents or guardians of such persons.

Prior to trial, the parties entered into a joint stipulation respecting class certification which allowed for the alteration or amendment of the class "before the decision on the merits if it appears to the court from the evidence adduced at the hearing on the merits that the class described herein is too broad and should be more narrowly defined." In the order of December 30, 1982 this court authorized the certification of the class herein described, concluding that the definition of the class is not too broad because the determination of the content of a handicapped child's educational program

must be made on an individual basis by school officials and parents.

10. State records indicate that there are approximately 126,000 handicapped children in Missouri, 95,000 of which are provided public special educational services. Of those 95,000 handicapped children, approximately 78,000 children are educated by their local school districts, approximately 14,000 are educated by special school districts, and approximately 3,000 are educated directly by the State.

11. The DESE classifies handicapped children by handicapping condition. The approximate number of children in each classification is set out below:

a) Blind - 300
b) Partial Seeing - 900
c) Deaf - 800
d) Hard of Hearing - 2,400
e) Speech Impaired - 39,000
f) Educable Mentally Retarded - 25,000
g) Trainable Mentally Retarded - 3,000
h) Profoundly Mentally Retarded - 1,100
i) Behavior Disordered - 8,400
j) Learning Disabled - 44,000
k) Orthopedically Handicapped - 1,800
l) Other Health Impaired - 3,000
m) Cerebal Palsy - 700.

12. Handicapped children in the State of Missouri may be provided public special educational services by any one of the following agencies:

a) State of Missouri:
   (1) DESE: 55 state schools for severely handicapped; Missouri School for the Deaf; and Missouri School for the Blind.
   (2) Department of Mental Health.
   (3) Division of Youth Services: children incarcerated under the supervision of the juvenile courts.
   (4) Division of Corrections: children incarcerated under the adult criminal code.

b) Local school districts.

c) Special School districts.

d) Private agencies under contract with public agencies.

13. Other than those children served by the Division of Youth Services and Corrections as a result of their incarceration, handicapped children provided educational services directly by the State of Missouri have been classified as "severely handicapped" pursuant to Mo. Rev. Stat. §162.675(3). The statute defines "severely handicapped children" as follows: "children under the age of twenty-one years who, because of the extent of the handicapping condition or conditions, as determined by competent professional evaluation are unable to benefit from or meaningfully participate in programs in the public schools for handicapped children. The term

'severely handicapped' is not confined to a separate and specific category but pertains to the degree of disability which permeates a variety of handicapping conditions and education programs." Therefore, under Missouri law, a child will be classified as "severely handicapped" once the determination has been made that the child cannot be served by the local school districts. In Missouri, approximately .05% of all handicapped children are classified as severely handicapped.

14. The State of Missouri, through the DESE, the Department of Mental Health, Division of Youth Services, Division of Corrections, and through private agencies under contract, provides public special educational programs for a school term of 180 days, which results in a summer break of 2 to 3 months.

15. The State of Missouri does not determine or consider on an individual basis whether handicapped children require or may require educational programming in excess of the traditional 9 month school year. Nor does the State, through the DESE require local and special school districts to determine on an individual basis whether handicapped children are in need of an educational program in excess of 180 days. In fact, there was testimony at trial establishing that the State of Missouri has an established practice of providing public special educational programs solely on a traditional 9 month basis. Mr. Hall testified at trial that hearing officers in the State of Missouri do not

have the authority to require the provision of educational programming in excess of 180 days. Any decision to the contrary will be overturned automatically by reviewing state officials.

16. Defendant SSD provides special educational services to approximately 14,000 handicapped children. Unlike the State of Missouri, SSD contends that they do not have a policy or practice precluding consideration of a child's need for education beyond the traditional 180 day school year. Instead, the SSD argues that the named plaintiffs and other members of this class of handicapped children have not demonstrated need for an extended school year.

17. Currently, the SSD does not provide any type of educational services to handicapped children beyond the traditional 9 month school year. Although it might be possible to conclude that none of the children would require a program without any extended break, it is more than likely that if full individual consideration had been given to each child's potential need for extended programming at least some of the children would have been found to require some type of educational service beyond the traditional 9 month school year. The fact that all of the children being served by the SSD were uniformly found to require only 180 days of programming indicated that the educational needs of the handicapped children were considered only in the context of the amount of schooling presently available to them.

Furthermore, there is evidence in the record establishing that SSD administrators believed that they did not have the authority to provide school in excess of 180 days per year. Mr. Paul Dulle, the SSD's Assistant Superintendent for Behavior Disorders, Learning Disabilities and Learning Disorders, testified at the time of his deposition that there was "no provision in the Special School District to provide any programs beyond the calendar approved . . . by the Board of Education each year." Therefore, in light of the evidence, it must be concluded that the SSD in fact does have a policy or practice of refusing to consider or provide for a mentally retarded child's educational needs beyond the traditional 9 month school year.

18. Summer school is provided to children in Missouri at the option of local school districts. Some local school districts have made summer programs available to handicapped children. However, none of these programs are available for those children who have been designated as "severely handicapped" under Missouri law, and who are enrolled in the state schools for the severely handicapped.

19. Local school districts receive funds for summer school programming either through the school foundation formula provided in Mo. Rev. Stat. §163.011(2), or under Title 1 of the Elementary and Secondary Act of 1965, or from both sources. Of the money appropriated by the legislature to the DESE for local schools,

expenditures are first provided for transportation aid and exceptional pupil aid. The remainder, which is the substantial majority of the total appropriation, is divided among local school districts, including special school districts pursuant to the foundation formula, based primarily on pupil attendance. Mo. Rev. Stat. §§162.975-162.990. Additional state funds for the education of handicapped children are provided to local and special school districts apart from the funds provided under the foundation formula. However, state aid for the education of the handicapped, in the form of funds provided by class, staff members and staff aid, is limited to a "term of one hundred eighty days" by Missouri State law. Mo. Rev. Stat. §162.975.

20. The state defendants confess that it is their policy and practice to refuse to provide or to fund educational programming for any severely handicapped child enrolled in the schools of the State Board of Education or served by the Board in excess of 180 calendar days per year. It has been established that summer school programming may be provided at the discretion of local educational agencies for handicapped or non-handicapped children; these districts receive funds under the foundation formula. However, funds available to local agencies during the normal school year for the purposes of educating the handicapped are not available during the summer break. The fact that the provision or non-provision of summer programming for handicapped or non-handicapped children is an option

of the local school district, does not change this court's conclusion that the fiscal policies of the State of Missouri allow for the provision of services to the non-handicapped children during the summer months and do not allow for the provision of programming for the severely handicapped. Furthermore, in the event a local district wishes to provide handicapped children with education beyond the traditional 180 days, the local agency must bear the additional cost. The responsibility for this financial burden may very well deter a local school district from considering the needs of handicapped children for school in excess of 180 days. Therefore, although the state defendants' policy toward summer programming of children in Missouri is perhaps neutral on its face, it has the effect of providing services to non-handicapped children, which are denied to the handicapped and severely handicapped.

21. At trial, the plaintiffs presented evidence in support of their contention that handicapped children suffer educational regression during interruptions in programming which can have a substantial impact on their progress and on their potential for achieving any degree of independence. In support of this conclusion plaintiffs' expert witnesses testified that regression resulting from breaks in educational programming can result in the actual loss of skills previously required, or a lack of motivation to perform skills that a child retained. Furthermore, it was contended that regression can result in an increase in inappropriate behaviors and

can affect motor and communication skills. One of the plaintiffs' leading expert witnesses, Lou Brown, who is a professor of special education at the University of Wisconsin, testified that limiting every handicapped child's education to the traditional 9 month school year deprives certain handicapped children of the opportunity to experience an appropriate education. Dr. Brown emphasized that not all handicapped children are in need of additional services; however, he stressed that this determination must be made on an individual basis. Dr. Brown identified certain learning characteristics of the severely handicapped which make it more likely that they will regress than the normal child. Dr. Brown stated that the severely handicapped are capable of learning fewer and lesser complicated skills. Furthermore, the handicapped have a greater difficulty acquiring skills and are likely to lose a greater number of skills over time. Finally, it is difficult for them to transfer what they have learned. Dr. Brown also identified a number of variables that parents and educators should consider when determining whether a particular handicapped child should have educational programming in excess of the traditional school year. He suggested that the child's progress, behavioral and physical problems must be examined. In addition, the Doctor stated that the availability of alternative resources, the ability of a handicapped child to interact with non-handicapped children, the areas of the child's curriculum which need continuous attention, the degree of regression suffered by the child, and a child's

vocational needs should all play a role in the determination of whether extended programming was appropriate, and if appropriate, the types of services that should be provided to the child. Finally, the Doctor stressed that economic concerns should also be taken into account; one of the goals for handicapped children is to allow them to become contributing members of society as opposed to dependent institutionalized adults.

22. Plaintiffs' witnesses in general agreed that a continuous program of education, without extended breaks, would lessen the likelihood of regression in certain handicapped children. However, each of the plaintiffs' experts stressed that the determination of whether extended programming was necessary should be made on an individual basis. Dr. H. D. Bud Fredericks, who is a research professor and associate director of teaching research, a division of the Oregon state system of higher education, suggested a means of identifying both the children who are in need of extended programming and the type of services that would be appropriate for these children. He testified that school officials should evaluate a child's progress in each area of the curriculum, and the regression that occurs in each area after a break. He further testified that those children who show significant regression and require over a month to recoup skills should be considered for summer programming.

23. In addition to expert testimony, plaintiffs presented further testimony seeking to establish the existence of regression in specific children. Michael Yaris, one of the named plaintiffs in this action, is an 11 year old autistic child with a severe language problem, a severe behavior disorder, and functional retardation. He has been evaluated by the SSD as behaviorally disordered, communication impaired and functionally, intellectually and academically retarded. Michael has attended the Judevine Center for Autistic Children, except for a 6 month period, since October of 1975 when he was 4 years old. Since he has attended this Center he has had continuous programming except for 3 exceptions when he took a break of a month or more. Michael's father testified that Michael's behavior deteriorated significantly during these breaks and that it took him a sizeable length of time to recoup his skills. Rebecca Blackwell, Director of the Judevine Center, also testified that Michael suffered regression as a result of these breaks. She stated that Michael suffered from severe withdrawal, increased restlessness, aggressiveness, and inappropriate behaviors after these breaks. She contended that the return of his behavior difficulties severely impeded Michael's academic progress. She concluded that extended programming for Michael was appropriate because of his inability to deal with an unstructured environment.

24. Adam Stubbs is a 7 year old severely mentally and physically retarded, hyperactive, epileptic child with

severe delays in language and speech development and autistic behaviors. After the determination was made that Adam was "severely retarded," the DESE contracted with the Sherwood Center for Exceptional Children, Inc., in Kansas City, Missouri, to provide Adam with a special education program for the 1980-81 and 1981-82 school years. The State agreed to provide funding for Adam for the traditional 9 month school year; nonetheless, Adam attends the Sherwood Center year round with a minimal number of 2 week breaks. Marilyn Stubbs testified that by the end of a 2 week break Adam resorts to extensive crying, tantruming, and head banging. Deborah Wood, Director at the Sherwood Center testified that the regression that Adam would experience during a 3 month break could severely jeopardize his potential for learning skills or achieving any degree of independence. Ms. Wood further testified that she was been told by the DESE to strike any reference to summer programming when applying for State funds.

25. The defendants also produced a considerable amount of evidence on the question of regression, including testimony by experts and teachers and aides who work in the SSD schools. Through this testimony, the defendants sought to establish that handicapped children did not regress during a summer break. In fact, the defendants contended at trial that many of the children studied actually showed progress in certain areas after breaks. The defendants advanced a number

of different theories in support of their assertion that summer vacations are advantageous to handicapped children. The first theory advanced is that handicapped children need a break from a structural environment in order to be motivated to continue learning. Second, the defendants assert that summer vacations allow handicapped children an opportunity to obtain a valuable informal education not available in the structured environment of the school. Finally, the defendants theorized that the summer break affords these children an opportunity to transfer skills learned in the academic environment to the home environment.

26. In support of their general theory that handicapped children do not suffer regression over extended breaks and in fact can benefit from a break, the defendants presented the expert testimony of Dr. Keith Turner, an associate professor in the field of special education at the University of Texas at Austin. Dr. Turner has testified in several cases involving the issue of handicapped children and their need for extended programming.[2] Dr. Turner testified that he was of the opinion that an extended school year is generally unnecessary for handicapped children; he based

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[2]See Armstrong v. Kline, 476 F.Supp. 583 (E.D. Pa. 1979), remanded sub nom. Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980); Georgia Ass'n. of Retarded Citizens v. McDaniel, 511 F.Supp. 1263 (N.D. Ga. 1981).

his opinion on a study he conducted in Savannah, Georgia in the years 1979 and 1980 with 3 classes of severely and profoundly retarded children. Dr. Turner's methodology consisted of administering the portage checklist to these children both before and after a summer break and several times during the following year for the purposes of determining whether there was regression over the break and determining the recoupment periods after the break. The portage consists of at least 500 skills that the children must perform. Dr. Turner presented evidence showing the total number of skills that each child could perform before and after the summer break; his data showed that only 1 handicapped child had a lower total score after the break.

27. The portage checklist is regularly used as a teaching tool and is administered to students with a developmental age of up to 6 years. The purpose of the test is to determine the skills a particular child has and what skills a child should be taught. The test was not designed to measure a child's developmental age. In fact many of the items on the checklist were not part of the particular child's curriculum and therefore are not determinative of the question whether the child was progressing or regressing in school. Furthermore, the checklist did not contain many of the items on the children's curriculum at school. Therefore this court must conclude, as the court concluded in Georgia Ass'n of Retarded Citizens v. McDaniel, that

the portage checklist is of doubtful probative value on the question of whether or not handicapped children regress after an extended break from programming. 511 F.Supp. 1263, 1274 (N.D. Ga. 1981).

28. Despite the general contention of the defendants that handicapped children do not suffer regression during extended breaks, the majority of their witnesses testified summer programming would be appropriate for certain handicapped children and might improve their rate of retention. Futhermore, it was stressed that this determination must be made on an individual basis.

29. On the basis of the record and the evidence presented at trial, this court must conclude that as a general proposition handicapped children do regress after an extended break. The extent of the regression and the recoupment problems resulting from a break in programming can only be determined by examining the individual child and determining whether the child is in need of an environment which is more structured than his parents can provide at home.

30. In addition to presenting evidence on the issues of regression and extended programming, the plaintiffs Robert and Mary Yaris presented evidence on the questions raised by their individual action on behalf of their son, against the SSD in Count I of the first amended complaint. Plaintiffs Robert and Mary Yaris contend that the defendant failed to implement an

educational program for their son Michael in a timely manner, and also failed to pay for the costs incurred in the administrative due process proceeding. Therefore the Yarises brought this claim to recover both the costs of the transcript and record of the panel hearing and for providing an education for Michael from April, 1979 through August of 1980. They claim that they are entitled to recover the following expenditures: Judevine Center for Autistic Children, April, 1979 through August, 1980, $200.00 per month ($3,400.00); Learning Consultants, Inc., William Ferzacca, April, 1979 through May, 1979, $160.00; Nancy Newmeyer, attendance at the New City School and Affton afterschool programs, April, 1979 through August, 1980, $1,600.00; and transportation, April 1979 through August 1980, $1,566.00 (6,960 miles x .225). The total costs equal $6,286.00.

31. The SSD first evaluated Michael Yaris, at the request of his parents in the early part of 1979. At this time, Michael was diagnosed as behaviorally disordered, communication impaired, functionally, intellectually and academically retarded.

32. A conference for the development of an individualized education program (hereinafter "IEP") was conducted by the SSD for Michael Yaris on March 15, 1979; resulting in the recommendation that Michael be placed in the Bridgeton School classroom in March of 1979. There were several issues that remained

unresolved after this conference. Due to the Yarises' disagreement with the content of their son's IEP, they did not request the SSD to implement the program which it was willing to provide at that time. Instead, they asked the SSD to contract with the Judevine Center, which was the school Michael was attending at the time. The SSD scheduled a further conference in order to obtain additional information in an effort to reach an agreement about the appropriate placement for Michael.

33. By letter from their attorney dated May 29, 1979, Robert and Mary Yaris requested that the SSD conduct a hearing for the appeal of Michael's evaluation and IEP.

34. A second IEP conference was held on May 31, 1979 by the SSD for Michael Yaris. Again, the parties were unable to resolve all the issues with respect to Michael's IEP and therefore the Yarises requested an administrative review of the IEP as provided by Missouri law. The first step in the due process proceeding is an informal conference which was conducted by the SSD on July 18, 1974. At this conference, the Yaris plaintiffs and the SSD discussed the objections to the IEP and the SSD agreed to submit a proposed amendment to the May 31, 1979 IEP.

35. By letter dated August 1, 1979, the SSD informed Robert and Mary Yaris that it would not

provide summer programming. In addition, the SSD submitted its amendment to the May 31, 1979 IEP.

36. By letter dated August 9, 1979, Robert and Mary Yaris requested of the SSD a due process hearing to appeal Michael's evaluation and the IEP. Missouri law provides for a formal hearing before a 3 member panel selected by the parties.

37. One week prior to the due process hearing, on January 22, 1980, through their respective attorneys, the Yarises and the SSD confirmed that all of the components of an IEP for Michael were agreed upon except for the issue of continuous programming.

38. The due process hearing was conducted by a 3 member panel pursuant to Missouri law on January 29 and 30 of 1980. The panel decision and a dissenting opinion were rendered on or about February 14, 1980. The decision was adverse to the Yarises.

39. The Yarises, through their counsel sent a letter dated February 13, 1980 to the SSD requesting implementation of Michael's IEP, as amended. The Yarises requested immediate implementation of a program which was consistent with Michael's IEP if such a program existed at that time. If an appropriate program was not available they requested enrollment as soon as possible. In the event enrollment had to be delayed, the Yarises requested a contractual

arrangement with the Judevine Center. Finally, in their letter, the Yarises sought financial reimbursement for Michael's private programming from March 15, 1979 through January 22, 1980 on the ground that Michael's IEP proposals were inappropriate.

40. On February 15, 1980 the Yarises requested a review of the decision of the 3 member panel by the State Board of Education on the adverse panel level hearing decision.

41. By letter dated March 7, 1980 the Yarises requested that the SSD pay the costs of a copy of the transcript of the hearing before the 3 member panel and a copy of the complete record of the hearing for review by the State Board of Education. The SSD refused to pay for these costs.

42. On March 31, 1980 the Yarises sent to Dr. Leonard W. Hall, the hearing officer designed by the State Board of Education, a copy of the transcript and record of the panel hearing which the Yarises had obtained at their own expense in the amount of $388.70. By appealing the decision to the State Board of Education, Robert, Mary and Michael Yaris exhausted their administrative remedies under Public Law 94-142.

43. In response to the Yarises' request of February 13, 1980 to implement Michael's IEP of May 31, 1979, arrangements were made in April by the SSD to place

Michael in its Gibson School classroom. On April 24, 1980, through their counsel, the Yarises informed the SSD that they did not wish to enroll Michael in the program offered.

44. In the fall of 1980, the Yarises enrolled Michael in the SSD program. In April of 1981 Michael was removed by his parents from the SSD program and returned to the Judevine Center where he is attending presently and where he attended throughout the administrative proceedings. In accordance with the wishes of the plaintiffs, the SSD agreed to contract with the Judevine Center for Michael's program for the 1981-82 school year. Currently Michael's educational program is funded by the SSD except for services he received in the summer which is in part funded by contract with the Missouri Department of Mental Health. The Yarises pay the remainder of his costs for Michael's summer program.

CONCLUSIONS OF LAW

This court has jurisdiction of this case pursuant to 20 U.S.C. §1415(e), U.S.C. §1331, and 28 U.S.C. §1343. The named plaintiffs instituted this class action for the purpose of securing declaratory and injunctive relief against the continued application of the policy of the defendants, which precludes the provision of educational services for handicapped children in the State of Missouri in excess of the traditional 9 month school year. The plaintiffs contend that this policy violates

the Education For All Handicapped Children Act, 20 U.S.C. §§1401 et seq.; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794; 42 U.S.C. §1983, the Equal Protection and Due Process Clauses of the Fourteenth Amendment; the Missouri Constitution, and Mo. Rev. Stat. §§162.670 et seq. In addition, the plaintiffs seek a mandatory injunction compelling defendants to make available to the named plaintiffs education programs which extend beyond the traditional 180 day school year.[3]

1. The 9 Month Policy and the Education for All Handicapped Children Act.

The Education For All Handicapped Children Act of 1975, 20 U.S.C. §§1401 et seq., provides state and local agencies with federal money to assit in the education of handicapped children. However, the provision of this money is conditioned upon a state's compliance with extensive goals and procedures outlined by Congress in the statute. In order to qualify for federal financial assistance under this Act, a state must demonstrate that it "has in effect a policy that assures all handicapped children the right to a free appropriate education." 20 U.S.C. §1412(1). In order to ensure the

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[3]The questions raised by the 180 day policy will be considered before considering the issues raised by the Yaris plaintiffs in their individual action against the SSD.

provision of that right the Act further requires that each state develop a plan, 20 U.S.C. §1412(2), establish procedural safeguards, 20 U.S.C. §1415(5), and require local educational agencies to establish individualized educational programs. 20 U.S.C. §1412(4). The plan must be approved by the Commissioner of Education before the State can acquire any assistance. 20 U.S.C. §1413.

Section 1401(18) of the Act defines "free appropriate public education" as:

> Special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required under §1414(a)(5) of this title.

The Act goes on to define "special education" as "specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." 20 U.S.C. §1401(16). "Related services" are defined as those services which "may be required to assist a handicapped child to benefit from special education . . ." 20 U.S.C. §1401(17). Examples of these services are transportation, speech pathology, recreation, physical and occupational therapy,

counseling services, physchological services, and medical services necessary for diagnosis and evaluation. Most importantly, "[t]he 'free appropriate education' required by the Act is tailored to the unique needs of the handicapped child by means of an 'individualized educational program' (IEP) §1401(18)." Board of Education of the Hendrix Hudson Central School District v. Rowley, 102 S.Ct. 3034, 3038 (1982). The IEP is a

> written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardians of such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether institutional objectives are being achieved.

Section 1414(a)(5) of the Act requires the state to establish procedures whereby the IEP is revised by the local educational agency at least annually.

In addition to requiring the state to provide handicapped children with a "free appropriate education," the Act also imposes procedural requirements on the states to assure that the IEP is appropriately formulated to the unique needs of the specific child. Parents or guardians of handicapped children must be notified whenever the local agency proposes to make a change in "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child," and must be allowed to bring a complaint about "any matter relating to such evaluation and education." 20 U.S.C. §1415(b)(1). The Act entitles the parent or guardian to a due process hearing whenever such a complaint is made, and appeal to the state educational agency is required in the event the initial hearing is held at the local or regional level. 20 U.S.C. §§1415(b)(2) and (c). Finally, "any party aggrieved by the findings and decision" may appeal to a state court of competent jurisdiction or to a district court of the United States. 20 U.S.C. §1415(e)(2).

It is clear from the substantive and procedural provisions found in the Education For All Handicapped Children Act, that the fundamental requirement rests in the mandate that the state have in effect a policy that assures handicapped children the right to a "free appropriate education." 20 U.S.C. §1412(i). Therefore, the major issue raised by the plaintiffs' complaint is whether a policy that prohibits the consideration of

ahandicapped child's educational needs in excess of the traditional 9 month school year contravenes the responsibility of the state to provide handicapped children with a "free appropriate public education." In order to resolve this issue, an effort must be made to define the Act's requirement of a "free appropriate public education."[4]

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[4]Several courts have considered the question whether the policy of refusing to provide more than 180 days of education is incompatible with the requirements of the Act. Unfortunately, with the exception of one case, these opinions were decided prior to Board of Education of the Hendrick Hudson Central School District v. Rowley, 102 S.Ct. 3034 (1982). Every court, prior to the Rowley required state administrators to consider the needs of handicapped children in excess of the traditional 9 month school year. Battle v. Pennsylvania, 629 F.2d 269 (3rd Cir. 1980), cert. denied, 452 U.S. 968 (1980); Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F.Supp. 1263 (N.D. Ga. 1981); Lee v. Clark, No. 80-0418 (D. Hawaii Jan. 30, 1981); Moore v. Roberts, No. LR-C-81-419 (E.D. Ark. July 24, 1981); Hilden v. Evans, No. 80-511-RE (Oregon, November 5, 1980). In Battle v. Pennsylvania, the only Court of Appeals decision, the Third Circuit held that the "inflexible application of a 180 day maximum prevents the proper formulation of appropriate educational goals for individual members of the plaintiff class." Only one court has upheld the application of this policy. In Crawford v. Pittman, the court held "that the Education for Handicapped Children Act did not intend to mandate a specific federal handicapped educational standard," and therefore states were free to provide minimal programming to handicapped children. No. GC 80-16-LS-O (July 12, 1982). The reasoning of the latter decision is clearly incorrect in light of the Supreme Court's holding in Rowley, in which the court concludes

In Board of Education of the Hendrick Hudson Central School District v. Rowley, the Supreme Court for the first time was called upon to interpret provisions of the Education For All Handicapped Children Act. In this opinion the Court explicitly addressed the question of "what is meant by the Act's requirement for 'free appropriate education'?" The Court concluded that "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." 102 S.Ct. at 3048. While recognizing that the determination of whether a particular handicapped child is receiving sufficient services to satisfy the requirements of the statute presents a more complex problem, the court presented

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that the Act prescribes the basic federal standards that states must meet in order to receive funds under the Act. Therefore, the remaining question is whether the principles enunciated by the Supreme Court in Rowley are in conflict with the reasoning of the courts which found the policy of refusing to consider educational programming for the handicapped in excess of the 9 month school year in conflict with the requirements of the Act. For reasons stated in the text, this court does not believe that Rowley changes this basic conclusion, although the reasoning found in several of these cases may have to be modified. The only subsequent to the Rowley decision is Phipps v. New Hanover County Bd. of Educ., 511 F.Supp. 732 (E.D. N.C. 1982). The court reasoned that "[i]t is clear that under the EAHCA, and its regulations, the Board must provide services year round if a handicapped child will substantially regress during the summer recess." 551 F.Supp. at 734 (cites omitted).

a standard to aid in making that determination. A state satisfies the requirement that it provide a handicapped child with a "free appropriate public education" by "providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade level used in the State's regular education, and must comport with the child's IEP." Id. at 3049.

In an effort to lend meaning to the general standards of compliance prescribed by the Supreme Court in Rowley, and to apply those standards to the facts of the present case, it is necessary to examine the analysis which lies behind the Court's decision. There are three major aspects of the opinion that will be considered prior to determining whether the State of Missouri is meeting its obligation under the Act by providing handicapped children with a "free appropriate education," which requires that these children have "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Id. at 3048. First, there will be an examination of the standard for determining whether a particular child is receiving adequate services; second, there will be a consideration of the court's emphasis upon the individual needs of the child; and finally, the state's role in the

administration and development of educational programs will be examined, as will the implications it has for relief in the context of this case.

In its decision, the Supreme Court clearly recognized that the "determination of when handicapped children are receiving sufficient education benefits to satisfy the requirements of the Act" must be made on an individual basis. Id. at 3049. In recognition of this fact the Court found it necessary to limit its opinion in the following manner:

> We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.[5]

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[5]This case dealt with the education of Amy Rowley, a deaf student who attended school at Furnance Woods School in the Hendrick Hudson Central School District, Peekskill, New York. Amy has minimal residual hearing and is an excellent lipreader. Her parents and teachers decided to place Amy in a regular kindergarten class. Several members of the school administration attended a course in sign language, a teletype machine was installed in the principal's office to facilitate communication with her parents, and she was also provided with a hearing aid. Amy successfully completed her kindergarten year. The issue before the Supreme Court was whether the Aid For All Handicapped

Id. In contrast to the situation presented to the Court in Rowley, the class of handicapped children in Missouri are receiving fewer educational services than those non-handicapped children for whom summer school is available. There is evidence in the Rowley opinion that the Supreme Court anticipated that state administrators most likely could be obligated to provide handicapped children more services than those provided to children without handicaps, in order to comply with the statutory requirement of "free appropriate education."[6] However, more importantly, the standard outlined by the Court to determine whether Amy was receiving an adequate education under the Act, requires state educators to

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Children Act required school administrators to provide Amy with a qualified sign language interpreter in all of her academic classes. Despite its findings that Amy was performing better than the average child in class and that she was advancing easily from grade to grade, the District Court held that the failure to provide her with an interpreter was in violation of the Act. A divided panel of the United States Court of Appeals for the Second Circuit affirmed and the Supreme Court reversed.

[6]When rejecting the requirement that states are obligated to provide handicapped children with equal educational opportunities, the Court reasoned that the standard was unworkable because it required impossible measurements and comparisons. The Court further noted that the standard was inadequate because "furnishing handicapped children with only such services as are available to non-handicapped children would in all probability fall short of the statutory requirement of 'free appropriate public education'."

provide children with "personalized instruction," provided at public expense, and comporting with the child's IEP. Id. at 3044. Therefore, in order to meet the requirement of a "free appropriate education" at the very least, educators must examine the individual needs of a child in order to determine whether there are "sufficient support services to permit the child to benefit educationally from that instruction." Id.

In addition to concluding that no one test exists for determining the adequacy of educational services conferred on handicapped children, the Supreme Court stressed in Rowley that state educators are required "to adopt procedures which would result in individualized consideration of instruction for each child" in order to satisfy the requirements of that Act. Id. at 3042. The obligation of providing handicapped children with educational programs, designed in accordance with the unique needs of each child, is reflected in the requirement of the IEP. The IEP guarantees the handicapped child, procedurally and substantively, a free appropriate education. Therefore, any policy which inhibits the consideration of the individual educational needs of handicapped children necessarily conflicts with the Act's emphasis on the individual needs of the children and requirement of an IEP.

The final aspect of the Rowley decision that must be examined before applying the standards to the facts presented by this case, is the role which the state plays

in the administration of public education to handicapped children under the Education For All Handicapped Children Act. At the same time that the Supreme Court recognized that the Act imposes extensive procedural and substantive obligations on the states, it also noted that "the Act leaves to the states the primary responsibility for developing and executing programs for handicapped children." Id. at 3039. However, states are obligated to meet the "basic floor of opportunity" embodied in the Act, id. at 3048, and to provide handicapped children with equal access to educational services. The Court went on to anticipate the problem posed by insufficient funds:

> If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with the needs and ability to benefit therefrom. The inadequacies of the . . . Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child.

Id. at 3044 n. 15, citing Mills v. Board of Education of the District of Columbia, 348 F.Supp. 866, 876 (D.C. D.C. 1972). Therefore, inadequacy of funds does not relieve a state of its obligation to assure the handicapped child of equal access. Id. at 3047.

In view of the principles enunciated by the Supreme Court in Rowley, it is the conclusion of this court that the State of Missouri's policy of refusing to consider or provide more than 180 days of education for the severely handicapped is incompatible with the Act and the standards enunciated by the Supreme Court. Unlike the factual situation presented to the Court in Rowley, the plaintiffs in this action are receiving fewer services than non-handicapped children. Furthermore, the policy of the State of Missouri precludes "individualized consideration of and instruction for each child." Id. at 3042. Therefore, the State is failing to provide handicapped children with "the basic floor of opportunity" embodied in the Act. By refusing to consider the potential need of these children for programming "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." Id. at 3048. Finally, despite the lack of sufficient funds, the state is providing non-handicapped children and a few categories of handicapped children with educational services in excess of the traditional 9 month school year. Thus, it must be assumed that the scarcity of funding is being permitted to bear more heavily on the severely handicapped.[7] Thus, it is the conclusion

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[7] Although this court sympathizes with the difficulties faced by state officials in an era in which resources are scarce and cutbacks are frequent, this

of this court, under the facts presented by the circumstances of this case, that the State of Missouri is denying the plaintiff class a "free appropriate education" by failing to consider their educational needs in excess of the 180 day school year.

In addition to alleging that the State defendants are in violation of the Education for All Handicapped Children Act by maintaining a policy which prohibits the consideration or provision of educational services to the handicapped in excess of the traditional 9 month school year, the plaintiff class also has brought a cause of action against the SSD on the same grounds.[8] In order to determine whether the SSD is in breach of a duty imposed upon it by the Act, it is necessary to examine the statutory framework provided by Congress. One purpose of the Education For All Handicapped Children Act was to provide for one centralized agency in each state to assume responsibility for the provision of a "free appropriate education" to handicapped children. Therefore, ultimate responsibility for

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court cannot help but note that only one state in the country appropriates less funds than the State of Missouri for its educational system.

[8]Despite the defendant SSD's claim to the contrary it has been concluded that the District in fact has a policy that precludes the provision of educational services in excess of the traditional 9 month school year. See Findings of Fact Nos. 16 and 17.

compliance with statutory mandates rests on the state education agency. Kruelle v. Biggs, 489 F.Supp. 164, 174 (D. Del. 1980), affirmed Kruelle v. New Castle County School District, 642 F.2d 687 (3rd Cir. 1981). Section 1412(6) explicitly provides:

> The state educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the state, including all such programs administered by any other state or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the state educational agency and shall meet educational standards of the state educational agency.[9]

In light of the above statutory provision, it is the conclusion of this court that it is the responsibility of the state educational agency either to make sure that local agencies provide adequate services to handicapped children, or to provide these services, Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F.Supp. 1263 (N.D. Ga. 1981). Therefore, the SSD will not be adjudged to have breached a duty imposed by the Education For All

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[9]The Act further provides that if a local agency fails to provide appropriate services it is the responsibility of the state to provide an appropriate education directly to the handicapped children in the area served by the local agency. 20 U.S.C. §1414(d).

Handicapped Children Act.[10] However, it will have a joint obligation with the state in the future to provide the severely handicapped with an appropriate education, although ultimate responsibility will still fall on the state.

2. The 9 Month Policy and the Rehabilitation Act

In addition to asserting that the policy of the defendants which precludes the consideration of the educational needs of handicapped children in excess of the traditional 9 month school year violates the

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[10]There are additional reasons for not imposing liability upon the SSD. The SSD is clearly not discriminating against the handicapped or the severely handicapped in the use of funds because it does not provide educational services to non-handicapped children. Furthermore, the district does not provide any services during the summer school break. In contrast, it is the state which has agreed to allocate funding for the education of the non-handicapped in the summer months and at the same time has refused to provide comparable funds for the education of the handicapped and severely handicapped children. Therefore, if the scarcity of funding is not to be permitted to bear more heavily on the handicapped child, some of the funds presently used for extended programming provided to non-handicapped children should be allocated by the state to local districts for the purpose of providing comparable services to the handicapped. It would serve no logical purpose to order the SSD to use its already limited resources for the specific purpose of providing extended programming; additional funds should be provided by the state in a fulfillment of its responsibilities under the Act.

Education For All Handicapped Children Act, the plaintiffs' class also has brought a cause of action pursuant to Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. The statute provides:

> No otherwise qualified handicapped individual in the United States, as defined in §706(7) of this title, shall, solely by reason of his handicap be excluded from the participation in, be denied of the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulations shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which the regulation is so submitted to such committees.

It must be concluded from the plain meaning of the statute that a state educational system which is in receipt of federal funds is in violation of the Rehabilitation Act if the entity's practices preclude the handicapped from obtaining benefits realized by the non-handicapped. New Mexico Association for Retarded Citizens v. New Mexico, 678 F.2d 842 (10th Cir. 1982). It is evident from the record established at trial that the State of Missouri receives federal funds which it

distributes to local districts for the purpose of educating non-handicapped children during the summer months without providing comparable services to the severely handicapped. See Findings of Fact Nos. 18-20. Whatever benefits non-handicapped children realize when they attend summer school in Missouri are not available to the severely handicapped. By maintaining this policy the State of Missouri has violated the Rehabilitation Act on its face.[11]

In addition to alleging that a policy which precludes the provision of educational services to handicapped children in excess of the traditional 9 month year violates the Rehabilitation Act, 29 U.S.C. §794, the plaintiffs' class also claims that the policy conflicts with the regulations promulgated pursuant to the statute. The relevant regulations require recipients of federal funds that operate public elementary or

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[11] Just as it was inappropriate to find the SSD liable under the Education For All Handicapped Children Act, 20 U.S.C. §§1401 et seq., it would be inopposite to hold that the SSD is in breach of its duties under the Rehabilitation Act, 29 U.S.C. §794, or its regulations. The SSD is not in a position to be discriminating against the handicapped by providing services to the non-handicapped which it has failed to provide to the handicapped because it uses its funds exclusively for the education of the handicapped. The plaintiffs' class has not alleged that the SSD provides services to certain categories of the handicapped that are not provided to the severely handicapped.

secondary programs to "provide a free appropriate public education to each qualified handicapped person. . . ." 34 C.F.R. §104.33(a). Appropriate education is defined as regular or special education designed "to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met . . ." 34 C.F.R. §104.33(b)(1). The regulations further provide a means of meeting the requirement that education meet the individual needs of a handicapped is through the development of an IEP. 34 C.F.R. §103.33(b)(2). The language used in these regulations clearly parodies the language in the Education For All Handicapped Children Act, 20 U.S.C. §§1401 et seq.; the emphasis is the same. In order to comply with the regulations, school officials are obligated to consider the individual needs of the child in order to meet the requirement of an "appropriate education." Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F.Supp. 1263, 1281 (N.D. Ga. 1981). To the extent that the state's policy precludes the consideration of the individual needs of all handicapped children and provides services to the non-handicapped, the state is in violation of the Rehabilitation Act and its regulations.[12]

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[12]This court recognizes that the validity of regulations enacted pursuant to the Rehabilitation Act, 29 U.S.C. §794, have been called into question by the Supreme Court in Southeastern Community College v.

3. The Claims for Relief by the Named Plaintiffs

In addition to seeking declaratory and injunctive relief against the continued application of defendants' policy, which precludes the provision of education programs for handicapped children in excess of the traditional 9 month school year, plaintiffs seek an order requiring defendants to provide an extended school year program for named plaintiffs Michael Yaris and Adam

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Davis, 442 U.S. 397 (1979). In that case the Court construed regulations concerned with the post-secondary education rights of handicapped students. The Court reasoned that "[i]f these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of Section 504" and therefore would be invalid. Id. at 410. In the face of this decision a number of courts have found the regulations presently before this court valid. New Mexico Association for Retarded Citizens v. New Mexico, 678 F.2d 847 (10th Cir. 1982); Phipps v. New Hanover County Bd. of Educ., 551 F.Supp. 732 (E.D. N.C. 1982); Association for Retarded Citizens v. Frazier, 517 F.Supp. 105 (D. Colo. 1981); Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F.Supp. 1263 (N.D. Ga. 1981). This court concurs with this conclusion in the context of this case. It has already been shown that the additional services requested by the plaintiffs' class are required by the Education For All Handicapped Children Act. 20 U.S.C. §§1401 et seq. Therefore, the implementation of these regulations do not require "substantial adjustments in existing programs." Whether or not the regulations would be valid if the State of Missouri was not a recipient of and under the Education For All Handicapped Children Act is not a question that this court needs to reach.

Stubbs. For reasons which will be stated, this court does not feel it would be appropriate to grant the requested relief.

In addition to examining the substantive standards set out by Congress in the Education For All Handicapped Children Act in Rowley, supra, the court set out the appropriate standards for judicial review of a child's IEP. Section 1415(e)(2) provides that a civil action may concern "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." The Act further provides that in reviewing the complaint a court "shall receive the record of the [state] administrative proceeding, shall hear additional evidence at the request of a party, and basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." Section 1415(e)(2). On the basis of these provisions the Supreme Court concluded that Congress did not intend a court reviewing a child's IEP to "have a free hand to impose a substantive standard of review which cannot be derived from the Act itself." 102 S.Ct. at 3051. The Court then went on to suggest that a court's inquiry is limited to two considerations: "First, has the state complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? Id. However, the opinion

emphasized that a reviewing court must restrain itself from imposing its view of "preferable educational methods upon the states." Id.

Applying the above principles to the facts presented by this case this court must conclude that it is appropriate for the defendants to consider the needs of the named plaintiffs for educational services in excess of the traditional 9 month school year in the first instance. It has been found that it is presently the pattern and practice of the defendants not to consider whether handicapped children are in need of extended programming. See Findings of Fact Nos. 15, 17. Therefore, the needs of Adam and Michael have never been considered at the state level. Local officials clearly have a higher level of expertise in resolving this type of issue. For this reason, Congress specifically left the primary responsibility for developing a free appropriate education with state educational agencies, which are primarily responsible for the development of the IEP. Therefore this court declines to require the defendants to provide the named plaintiffs with educational services in excess of the traditional 9 month school year. However, it will be the order of this court that the defendants shall consider the needs of the named plaintiffs and the member of the class without the limitation previously imposed by the defendants' policy of precluding the provision of educational services in excess of the traditional 180 day school year.

4. Violations of 42 U.S.C. §1983, the United States Constitution and Missouri State Law

In addition to challenging the defendants' policy of limiting educational services for the handicapped in the State of Missouri to the traditional 9 month school year pursuant to the Education For All Handicapped Children Act, 20 U.S.C. §§1401 et seq., and §504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. §794, the plaintiffs' class also alleged a cause of action for statutory violations pursuant to 42 U.S.C. §1983. In Maine v. Thiboutot, the Supreme Court suggested that 42 U.S.C. §1983 is available as a remedy for violations of federal statutes. 448 U.S. 1 (1980). Subsequently, the Court limited this principle substantially by recognizing two exceptions to this general rule. Middlesex County Sewage Authority v. National Sea Claimers Association, 453 U.S. 1 (1981). However, it is unnecessary to reach the §1983 issue under the facts of this case because violations of the Education For All Handicapped Children Act and the Rehabilitation Act have been found. The plaintiffs' class is not seeking damages in this action. Furthermore the relief requested for the statutory violations is coextensive with the relief sought pursuant to §1983. Meiner v. Missouri, 673 F.2d 969 (8th Cir. 1982).

The plaintiffs' class also has alleged that the policies of the defendants violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and

that 42 U.S.C. §1983 provides a remedy for these violations. Whenever an issue may be resolved on statutory grounds, it is appropriate for a court not to address the constitutional claims. Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1935). Therefore, these issues will not be addressed.

Finally, the class of plaintiffs seek to invoke this court's pendent jurisdiction to review its claim under the Missouri Constitution and Mo. Rev. Stat. §§162.670 et seq. The exercise of pendent jurisdiction lies within the discretion of the court. United Mine Workers v. Gibbs, 383 U.S. 715 (1966). The interpretation of the Missouri statutes involves novel questions of state law which this court is reluctant to consider. It is more appropriate for state courts to interpret state law in the first instance. Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F.Supp. 1283. Therefore, these issues will not be reached.

5. The Individual Claim of the Yaris Plaintiffs Against the Special School District

In Count I of the complaint plaintiffs Robert and Mary Yaris brought an individual action on their own behalf, and on the behalf of their minor son, against the Special School District for failing to provide their minor son with an appropriate education. More specifically, the plaintiffs allege that the defendant SSD failed to implement an educational program for Michael

in a timely manner and failed to pay costs incurred during the administrative proceedings. The plaintiffs contend that the actions of the defendant constitute a violation of the Rehabilitation Act, 29 U.S.C. §794, 42 U.S.C. §1983, and Missouri state law; they seek injunctive, declaratory, and monetary relief. Plaintiffs seek reimbursement for costs of the transcript and record of the panel hearing and for providing an education for Michael from April of 1979 through August of 1980. See Finding of Fact No. 30.

On the basis of the record and evidence adduced at trial, see Findings of Fact Nos. 30-42, it is the conclusion of this court that the SSD has not breached any obligation required by law by failing to reimburse the plaintiffs for the cost of educating Michael from April of 1979 through August of 1980. It is clear from the record that the SSD made a good faith effort to implement Michael's IEP in a timely fashion. Furthermore, the plaintiffs have failed to present authority for its allegation that a school district is in breach of its legal obligations if it fails to provide costs for educating a handicapped child prior to the implementation of a child's IEP.[13] Furthermore, in this

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[13]Plaintiff's use of Howard S. v. Friendswood Independent School District, 454 F.Supp. 634 (S.D. Tex. 1979) as authority for recovery is inopposite. In that case, the court agreed to award the plaintiff relief because it found that the school district had engaged in

case several of the delays resulted from the actions of the plaintiffs. However, under Missouri law, the plaintiffs are entitled to recover costs incurred for the transcript and record sent to the State Board of Education, in the amount of $388.70.

Relief

Accordingly, plaintiffs will be awarded $388.70 against the SSD on Count I of the complaint. The relief requested with respect to state defendants in Count II will be granted in part. It is the judgment of this court that the application of a policy which precludes the provision of educational services for the handicapped in excess of the traditional 9 month school year is unlawful. Therefore, an injunction will be entered prohibiting the continued application of a policy which refuses to consider the needs of the handicapped children for extended programming. In addition, an injunction will be entered requiring the state to live up to its obligation of making sure that local agencies provide handicapped children with an appropriate education by not applying a policy that refuses to consider the needs of the handicapped for summer programming. Finally, the request of the named plaintiffs for an injunctive relief requiring the defendants to provide them with extended programming

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(cont.)
a calculated, deliberate effort to avoid its legal responsibilities by failing to have a due process hearing and by constructively expelling the plaintiff.

will be denied. However, the state defendants will consider the need of these plaintiffs for educational services in excess of 180 days.

S/S John F. Nangle
United States District Judge

Dated: March 3, 1983